

1989

Toshiko Pickhover, Catherine Pickhover, Gloria Pickhover v. Smith's Management Corporation, Food King Properties, Young Electric Sign Company, Marveon, Inc., Image National, Inc. :  
Brief in Opposition to Certiorari

Utah Supreme Court

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Micheal K. Mohrman; Richards, Brandt, Miller & Nelson; Attorneys for Appellant/Petitioner.

Robert H. Henderson; Snow, Christensen & Martineau; Attorneys for Respondent.

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BRIEF

890244

IN THE SUPREME COURT OF THE STATE OF UTAH

TOSHIKO PICKHOVER, an  
individual and personal  
representative of the Estate of  
John W. Pickhover; CATHERINE  
PICKHOVER, an individual and  
GLORIA PICKHOVER, an individual,

Plaintiffs,

vs.

SMITH'S MANAGEMENT CORPORATION,  
a Utah corporation; SMITH'S  
FOOD KING PROPERTIES, a Utah  
corporation; YOUNG ELECTRIC  
SIGN COMPANY (Appellant/  
Petitioner); MARVEON, INC.  
(Respondent); and IMAGE  
NATIONAL, INC., an Idaho  
corporation,

Case No. ~~87-0000~~ 890244

Priority 13

Defendants.

MARVEON, INC.'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
OF APPELLANT YOUNG ELECTRIC SIGN COMPANY

UTAH COURT OF APPEALS CASE NO. 880193-CA

DECISION ENTERED APRIL 11, 1989

MICHAEL K. MOHRMAN  
RICHARDS, BRANDT, MILLER & NELSON  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777  
Attorneys for Appellant/Petitioner  
Young Electric Sign Company

FILED  
JUN 23 1989

ROBERT H. HENDERSON  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000  
Attorneys for Respondent  
Marveon, Inc.

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

TOSHIKO PICKHOVER, an  
individual and personal  
representative of the Estate of  
John W. Pickhover; CATHERINE  
PICKHOVER, an individual and  
GLORIA PICKHOVER, an individual,

Plaintiffs,

vs.

SMITH'S MANAGEMENT CORPORATION,  
a Utah corporation; SMITH'S  
FOOD KING PROPERTIES, a Utah  
corporation; YOUNG ELECTRIC  
SIGN COMPANY (Appellant/  
Petitioner); MARVEON, INC.  
(Respondent); and IMAGE  
NATIONAL, INC., an Idaho  
corporation,

Case No. 87-0060

Priority 13

Defendants.

---

MARVEON, INC.'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
OF APPELLANT YOUNG ELECTRIC SIGN COMPANY

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UTAH COURT OF APPEALS CASE NO. 880193-CA

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MICHAEL K. MOHRMAN  
RICHARDS, BRANDT, MILLER & NELSON  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777  
Attorneys for Appellant/Petitioner  
Young Electric Sign Company

ROBERT H. HENDERSON  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000  
Attorneys for Respondent

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QUESTIONS PRESENTED FOR REVIEW

Whether the Petition for a Writ of Certiorari was timely filed and whether this Court has jurisdiction over the Petition.

Whether Petitioner Young Electric Sign Company may raise issues for the first time in a Petition for a Writ of Certiorari.

Whether there is any special or important reason why this case should be entitled to two levels of appellate review.

REFERENCE TO OFFICIAL REPORT OF OPINION  
ISSUED BY THE COURT OF APPEALS

Pickhover v. Smith's Management Corp., 106 Utah Adv. Rptr. 43 (April 11, 1989).

STATEMENT OF LACK OF JURISDICTIONAL GROUNDS

1. Date of entry of decision sought to be reviewed:  
April 11, 1989.

2. Date of entry of any order granting an extension of time in which to petition for writ of certiorari: May 11, 1989. However, as is fully argued at Point I below, the extension was improvidently granted, as Rule 45(e) allows extension of the time for filing a petition only upon a showing of excusable neglect or good cause, neither of which was shown by Petitioner.

#### NO DETERMINATIVE PROVISIONS

Respondent agrees with Petitioner's statement that there appear to be no controlling provisions of constitutions, statutes, ordinances, or other regulations.

#### STATEMENT OF THE CASE

Respondent Marveon adopts Petitioner Young's Statement of the Case. Respondent Marveon points out that the Rule 54(b) Certification of the trial judge's granting of defendant/Respondent Marveon's Motion for Summary on Marveon's Cross-Claim against defendant/appellant/Petitioner Young came well before the trial below, and came at the insistence of Petitioner. Petitioner Young's "Record on Appeal" is, therefore, fixed at the time of the Rule 54(b) Certification. Lane v. Messer, 689 P.2d 1333, 1334 (Utah 1984) (Appeal of Rule 54(b) final judgment "only brings before [the appellate court] that portion of the action with respect to which the judgment has been entered"). Where Petitioner Young sought and obtained a Rule 54(b) Certification at the time of the summary judgment, Young cannot now use subsequent events at trial as a factual or legal basis for appeal.

## ARGUMENT

### POINT I

#### THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED AND THIS COURT LACKS JURISDIC- TION OVER THE PETITION

The date of entry of the decision by the Court of Appeals that Petitioner now seeks to have reviewed was April 11, 1989. Rule 45(a), Rules of the Utah Supreme Court, provides that a petition for a writ of certiorari "must be filed . . . within 30 days after entry of the decision by the Court of Appeals." The Petition was, therefore, due not later than May 11, 1989. On May 11, 1989, Petitioner obtained an Order granting an extension. The Order, however, was improvidently granted. Rule 45(e) specifically governs extensions of time for petitions for writ of certiorari, and specifically requires "a showing of excusable neglect or good cause" for any such extension. Petitioner failed not only to show either excusable neglect or good cause, but failed even to attempt such a showing.<sup>1</sup>

Petitioner's Ex Parte Request for Extension, a copy of which appears in the Appendix as Exhibit "G," states, in full, as follows:

---

<sup>1</sup>Nor can Petitioner take any comfort in Rules 22 or 26(a), because Petitioner completely failed to comply with them.

COMES NOW the defendant and petitioner Young Electric Sign Company pursuant to Rule 45(e) Rules of the Utah Supreme Court and requests this Court for an order extending the time to file its Petition for Certiorari to and including June 12, 1989.

In utter disregard of the requirements of Rule 45(e), and without any attempt to show excusable neglect or cause, let alone good cause, Petitioner simply sought, ex parte, to double the prescribed time. Sound reasoning underlies Rule 45(e). By the time of a petition for writ of certiorari, a case already has had full appellate review. The parties need finality, and the balance is tipped in favor of finality. It is then up to a petitioner to show a special reason that a case should not be final, and Rule 45(e) requires a petitioner to do so in a timely fashion. In this case, Young made no effort to show either excusable neglect or good cause for an extension. Young's Petition is untimely, and the Court lacks jurisdiction over it. Young's Petition should be dismissed.

#### POINT II

THE ONLY ISSUE LITIGATED BELOW AND RAISED ON APPEAL WAS WHETHER THE LANGUAGE OF THE PURCHASE AGREEMENT IS SUFFICIENT TO REQUIRE YOUNG TO INDEMNIFY AND/OR INSURE MARVEON, AND YOUNG MAY NOT NOW RAISE ANY OTHER ISSUES.

Young's Docketing Statement, a copy of which is found in the Appendix at Exhibit "H," states, at page 4:

#### ISSUE FOR REVIEW

The defendant Young Electric Sign Company brings the following issue for review in this appeal. . . .  
Whether the language of the Purchase Agreement . . .  
is sufficient to require defendant Young to indemnify  
and/or insure Marveon. . . .

Young's Brief on Appeal, filed with this Court on October 14, 1987, prior to this Court "pouring the case over" to the Court of Appeals, states, at the page (unnumbered) following the Table of Authorities:

#### ISSUES (SIC) PRESENTED FOR REVIEW

Whether the language of the Purchase Agreement . . .  
between Marveon and Young . . . was sufficient to  
require the defendant Young . . . to indemnify and/or  
insure Marveon . . .

For the very first time Young now attempts to raise the issue of whether indemnification is the proper measure of damages. This issue was never before raised by Young at either the trial or appellate court levels.

The issue of whether Young had a duty to Marveon under the terms of the Purchase Agreement also was not raised by Young below. Young's Memorandum in Opposition to Marveon's Motion for Summary Judgment is found at Exhibit "C" of the Appendix. Nowhere does it raise this issue, even tangentially, and neither do Young's Docketing Statement nor Young's Statement of the Issues Presented for Review.

As of February, 1989, Utah appellate courts had held at least 217 times, including 18 times within the previous year, that issues may not be raised for the first time on appeal, but rather must be fully raised and litigated below. For example, in Ortiz v. Industrial Commission, 766 P.2d 1092 (Utah App. 1989) (Davidson, Bench and Greenwood, JJ.), Ortiz argued on appeal that he was forced to use a letter of a doctor rather than the doctor's testimony. The Court flatly rejected the argument, stating, "[W]e will not consider an issue raised for the first time on appeal." Id. at 1094.

In Western Surety Co. v. Murphy, 754 P.2d 1237 (Utah App. 1988) (Greenwood, Orme and Billings, JJ.), Western Surety argued on appeal that summary judgment below was inappropriately granted because a genuine issue of material fact existed regarding whether damages should be offset by the value of the vehicle in question without title. The Court flatly rejected Western Surety's attempt, stating:

Issues that are not raised before the trial court may not be raised for the first time on appeal. . . . The issue of whether Curran's damages should be offset by the value of the car without title was not raised before the trial court. Therefore, this court will not consider the issue on appeal.

Id. at 1240 (footnote and citations omitted).

In this case, Young now tries to raise issues that were not raised below, were not litigated below, and were not preserved as issues on appeal.

### POINT III

#### THERE IS NO SPECIAL OR IMPORTANT REASON FOR REVIEW OF THIS CASE BY WRIT OF CERTIORARI.

This case is an ordinary, run-of-the-mill claim by one defendant, Marveon, against another defendant, Young, based on a contract between the two defendants. The appellant/Petitioner Young has been ruled against by the trial judge, after Young fully briefed and argued its case, and by the Court of Appeals, after appellant/Petitioner Young fully briefed and argued its appeal.

In seeking a second bite at the appellate apple, Petitioner has demonstrated only that it can recite the "buzzwords" for the standards for a petition. The facts simply do not support Petitioner's conclusory rhetoric that "the Court of Appeals has rendered a decision which has sanctioned the departure by the trial court from the accepted and usual course of judicial proceedings," that "the decision of the Court of Appeals is in conflict with prior decisions of this Court," and that "the questions presented for review are important enough that they should be settled by this Court." None of these rationale applies. The trial judge simply enforced a contract, and the Court of Appeals correctly affirmed the trial judge. When it comes to the substance of the actual case, Petitioner has failed to show how the standards for a petition are met by the facts. Petitioner took double the allotted time for filing the



Petition, and now remains unable to state a single cogent reason why the case is so special that it should not be final. If all litigants, who are dissatisfied with a decision of a trial judge and the Court of Appeals' affirmance of the trial judge were allowed a second review by this Court, there would be no reason to have a Court of Appeals; direct appeal to this Court would be preferable. This case has run its full course, and petitioner's Petition should be denied.

A. The Trial Judge Simply Enforced the Contract--The Purchase Agreement Clearly and Unambiguously Expresses The Intention That The Purchaser Of The sign (Petitioner Young) Agreed To "Fully Protect" The Seller Of The Sign (Respondent Marveon) Against Personal Injury Or Death Claims Arising Out Of The Sign.

By Section 2.a. of the Purchase Agreement, Young unambiguously agreed "to provide, at [Young's] expense, insurance coverage adequate to fully protect [Marveon] against . . . personal injury or death claims arising out of the ownership, maintenance, use, service . . . or installation of" the sign.

The stale arguments about who agreed to indemnify whom for whose negligence are irrelevant. The issue is not whether one party agreed to indemnify another party for only the first party's negligence, for only the second party's negligence, or for both the first party and the second party's negligence. On the contrary, Young specifically agreed to provide insurance

coverage adequate to fully protect Marveon against personal injury or death claims up to \$1,000,000, regardless of whose negligence caused the claim. Assuming, arguendo, that the death arose out of the original installation in 1978, as opposed to the reinstallation by Young in 1982, which Marveon vehemently denies, Young, through the Purchase Agreement of 1981, nevertheless agreed to provide insurance coverage adequate to fully protect Marveon against death claims arising out of the ownership, maintenance, use, service, or installation of the sign.

Viewed in the commercial context of the Purchase Agreement, this provision makes eminent good sense. Marveon was going out of the sign business. Young was taking over Marveon's pre-established business. Marveon was not interested in litigating, five to ten years down the line, about whether a claim arose out of the sole negligence of Young, the sole negligence of Marveon, or the combined negligence of Young and Marveon. Marveon wanted insurance coverage that would fully protect it against claims for personal injury or death arising out of the signs, regardless of the apportionment of fault. That is what Marveon bargained for; that is what Young agreed to do. The Purchase Agreement is clear and unambiguous on its face.

Young unequivocally agreed to provide insurance coverage adequate to fully protect Marveon against personal injury or

death claims arising out of the ownership, maintenance, use, service, or installation of signs. This case clearly arises out of the ownership, maintenance, use, service or installation of signs. The trial judge simply enforced the contract, and the Court of Appeals affirmed the trial judge.

B. The Purchase Agreement Between Marveon And Young Must Be Read As A Whole. Young's Arguments Would Effectively Write Paragraph 2.a., The Paragraph Whereby Young Agreed to Provide Insurance Adequate To "Fully Protect" Marveon, Out Of The Purchase Agreement.

Young claims that the language in paragraph 20.c. of the Purchase Agreement that Marveon "has performed in all material respects all obligations . . . and is not in default in any material respect" somehow voids Young's promise in paragraph 2.a. to provide insurance coverage adequate to fully protect Marveon. Such a construction effectively writes paragraph 2.a. out of the Purchase Agreement. If, as Young argues, a personal injury or death arising out of a sign Marveon had installed meant that Marveon had not fully performed in all material respects, or that Marveon was somehow in default in a material respect, there could be no possible circumstances ever to arise that would give any meaning to the provision of paragraph 2.a. whereby Young agreed to provide insurance coverage adequate to fully protect Marveon. If there were never an injury or death, there would never be a need for insurance; but, according to Young, if there ever were an injury or death, the fact of any

injury or death means Marveon has not performed and is in default, thus voiding paragraph 2.a and making its inclusion in the contract nonsensical.

Young claims that without the representation that Marveon had performed and was not in default, Young would never have agreed to provide the insurance coverage adequate to fully protect Marveon. Again, however, the argument fails logically. Had Marveon and Young known that no one would ever file a suit against Marveon, there would have been no reason for paragraph 2.a. The only way the two provisions of the Purchase Agreement can be interpreted harmoniously is that, as far as Marveon knew at the time of the Purchase Agreement, Marveon had performed in all material respects and was not in default in any material respect. There is no evidence, and no claim has been made, that as of the time of the Purchase Agreement, Marveon knew of any problem with the sign out of which this lawsuit arises.

Even more fundamentally, paragraph 20 is simply not applicable to this case. Paragraph 20 clearly refers to "contracts" and "defaults." Paragraph 20.c. states: "Except as provided in Schedule L, [Marveon] is not a party to any contract adversely affecting assets being purchased or contracts been assumed." The language Young relies on is simply language clarifying and explaining this introductory sentence of paragraph 20.c. Paragraph 20 does not refer to personal injury lawsuits or deaths. Paragraph 2.a. is the paragraph that addresses personal

injuries, deaths, and lawsuits arising therefrom, and is the paragraph that controls this case.

C. All Other Utah Indemnification Cases Are Different Than This Case. All Other Cases Arose Either In The Context Of An Employer Losing The Exclusive Remedy Provision Of Workmen's Compensation If The Indemnification Agreement Were Upheld, Or Cases Where The Indemnatee Took Advantage Of Great Disparity In Economic Power To Force The Indemnitor Into The Indemnification Agreement In The First Place.

Utah law is clear that:

where the intention to indemnify a person from losses attributable to his own negligence is "clearly and unequivocally expressed" in the contract language, an indemnity agreement will be upheld.

Shell Oil v. Brinkerhoff Signal Drilling Co., 658 P.2d 1187, 1189 (Utah 1983). The Purchase Agreement in this case clearly and unequivocally expresses an intention to indemnify Marveon against Marveon's own negligence.

In Shell Oil Co. v. Brinkerhoff Signal Drilling Co., 658 P.2d 1187 (Utah 1983), Brinkerhoff, an independent contractor drilling oil wells for Shell, had entered into an indemnification agreement with Shell that provided:

[Brinkerhoff] agrees to protect, indemnify and save . . . [Shell], its employees, and agents harmless from and against all claims, demands and causes of action of every kind and character arising in favor of . . . [Brinkerhoff's] employees, . . . [Shell's] employees or third parties on account of bodily injuries, death or damage to property arising out of or in connection with the performance of this agreement, except where such injury, death or damage has resulted from the sole negligence of . . . [Shell], without negligence or willful act on the part of . . . [Brinkerhoff], its agents, servants, employees, or subcontractors. . . . [Brinkerhoff] shall defend all suits brought upon such claims and pay all costs and

expenses incidental thereto, but . . . [Shell] shall have the right, at its option, to participate in the defense of any such suit without relieving . . . [Brinkerhoff] of any obligation hereunder.

Id. at 1189 n.1.

In Shell Oil, this Court held that this indemnification agreement clearly and unequivocally expressed Brinkerhoff's intention to indemnify Shell from losses attributable to Shell's own negligence.

The three Utah cases Young relies on are not applicable to the fact situation that existed between Young and Marveon at the time of the Purchase Agreement.

In Howe Rents Corp. v. Worthen, 18 Utah 2d 263, 420 P.2d 848 (1966), Howe, who was in the business of renting equipment to the public, attached a cement mixer to Worthen's truck. Worthen played no part in attaching the cement mixer to the truck. The mixer came loose from the truck, overturned, and was damaged. Howe sued Worthen for the damages to the mixer pursuant to the terms of the rental agreement. The Court held that language to the effect that bailee "shall be liable for all damage to or loss of equipment regardless of cause" does not constitute a clear and unequivocal expression creating an obligation for bailee to indemnify the bailor for the bailor's own negligence.

However, in that case, unlike this case, the indemnitee had every opportunity, power, and ability to make sure the cement mixer was properly attached. In this case, from and after the Purchase Agreement, Young had total control of the sign and Marveon had none.

In Union Pacific Railroad Co. v. El Paso Natural Gas Co., 17 Utah 2d 255, 408 P.2d 910 (Utah 1965), an El Paso employee was struck by the railroad's train at a crossing. The employee sued the railroad. The railroad settled the case, then sought indemnification from El Paso pursuant to the terms of an easement agreement. The court held that language to the effect that El Paso would indemnify Union Pacific from and against "any and all liability . . . of whatsoever nature . . . howsoever caused . . ." did not create an agreement to indemnify the railroad from its own negligence. However, in that case, unlike this case, El Paso had an easement across the railroad, an El Paso employee was hit by a train at the crossing and could not sue El Paso because of workmen's compensation exclusive remedy, and El Paso had to agree to the indemnification provision to get the easement in the first place.

In Freund v. Utah Power & Light, 625 F. Supp. 272 (D. Utah 1985), Judge Winder held that the indemnity provision at issue did not clearly and unequivocally express the intention to indemnify Utah Power & Light from losses attributable to its

own negligence. However, Freund, unlike this case, dealt with the factual situation where after the execution of the underlying agreement the indemnitor and the indemnitee were both going to continue to do business side by side, on the same poles. In this case, Young specifically promised to obtain insurance, up to one million dollars, to "fully protect" Marveon. In this case, Marveon did not need protection for Young's negligent acts prior to the Purchase Agreement--Young had nothing to do with the sign prior to the Purchase Agreement. Marveon did not need insurance for Young's acts after the Purchase Agreement. Marveon did not need insurance for Marveon's acts after the Purchase Agreement--Marveon was going totally out of business and selling all its assets to Young. The only thing Marveon needed insurance for to "fully protect" itself was for Marveon's acts prior to the Purchase Agreement, and this is exactly what Young promised to do, i.e., purchase insurance to "fully protect" Marveon.

In this case, Young agreed to provide insurance coverage adequate to fully protect Marveon. Marveon was going out of business and Marveon was selling its assets to Young. This was an arms length transaction where both parties knew Marveon would never again have any control over the signs. Paragraph 2.a. could not apply to anyone other than Marveon, and could not apply to any negligence other than Marveon's negligence.



Marveon needed no provision to protect Marveon against Young's negligence. Marveon could not be sued for Young's negligence. Marveon was going out of business, Marveon wanted to be protected from future lawsuits, and thus the provision of paragraph 2.a. whereby Young agreed to provide, at its expense, insurance coverage adequate to fully protect Marveon.

This case is different from all other Utah indemnification cases. Here there is no employer about to lose the exclusive remedy of workmen's compensation. Here there is no party with little or no bargaining power forced to enter into an adhesion contract including an indemnification agreement to get the use of the product, or to be employed as a subcontractor, etc. In this case, there was an arms length transaction wherein it made sound business sense for Young, who was forever after to control and maintain the sign, to protect Marveon, with insurance, against future lawsuits.

Both the trial judge and the Court of Appeals, after full briefing and full argument, simply enforced the terms of the contract. The decision is not in conflict with prior decisions of this Court, nor is it a "departure from the accepted and usual course of judicial proceedings [that] requires this Court to exercise its power of supervision." Young lost, but Young has had its full day in court. There is nothing special about this case justifying a second, full blown appellate review. The Petition should be denied.

CONCLUSION

Young's Petition for Certiorari is untimely, and attempts to raise issues for the first time that were not raised below or preserved on appeal. There is no special or important reason why this case should be entitled to two levels of appellate review. Young's Petition should, therefore, be denied.

Respectfully submitted this 26<sup>th</sup> day of June, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By Robert H. Henderson  
Robert H. Henderson  
Attorneys for Marveon

## APPENDIX

- Exhibit "A": Marveon's Motion for Summary Judgment
- Exhibit "B": Marveon's Memorandum in Support of Motion for Summary Judgment
- Exhibit "C": Young's Memorandum in Opposition to Marveon's Motion for Summary Judgment
- Exhibit "D": Marveon's Reply Memorandum
- Exhibit "E": November 10, 1986 Order and Judgment
- Exhibit "F": January 7, 1987 Rule 54(b) Certification
- Exhibit "G": Young's Ex Parte Request for Extension of Time to File Petition for Certiorari
- Exhibit "H": Young's Docketing Statement

Tab A

EXHIBIT "A"

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

OCT 6 4 17 PM '86

H. JUDITH HINDLEY CLERK

*K. White*  
RECORD CLERK

ROBERT H. HENDERSON  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Marveon Sign Company  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

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TOSHIKO PICKHOVER, et al.,  
Plaintiffs,

DEFENDANT MARVEON'S MOTION  
FOR SUMMARY JUDGMENT AGAINST  
DEFENDANT YOUNG ELECTRIC

vs.

SMITH'S MANAGEMENT  
CORPORATION, et al.,  
Defendants.

Civil No. C85-4307

Judge Scott Daniels

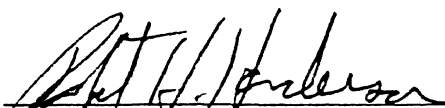
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Pursuant to Rule 56 of the Utah Rules of Civil Procedure, defendant Marveon Sign Company moves the Court for Summary Judgment in its favor, and against defendant Young Electric Sign Company, that in the event any judgment is returned in favor of plaintiffs and against Marveon, Marveon is entitled to be indemnified by Young Electric for the full amount of any such judgment up to \$1,000,000, and that Marveon be awarded its costs and attorney's fees incurred herein.

This Motion is based on the pleadings and depositions on file herein, and is supported by a Memorandum which more fully sets forth the basis of this Motion.

DATED this 24 day of OCTOBER, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By   
Robert H. Henderson  
Attorneys for Marveon Sign  
Company

SCM1904H

AFFIDAVIT OF SERVICE

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE )

          DONNA L. CAMPBELL          , being sworn, says  
that she is employed in the law offices of Snow, Christensen  
& Martineau, attorneys for           Marveon Sign, Inc.            
herein, that she served the attached Motion for Summary Judgment  
Against Defendant Young Electric and Memorandum in Support  
of Marveon's Motion for Summary Judgment Against Young Electric  
in Civil Number           C85-4307          , Third Judicial District  
Court upon the following parties by placing a true and correct  
copy thereof in an envelope addressed to:

Mark O. Van Wagoner  
VAN WAGONER & STEVENS  
Attorneys for Plaintiffs  
185 South State St., Ste. 550  
Salt Lake City, Utah 84111

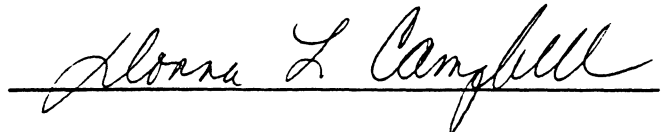
Roger H. Bullock  
STRONG & HANNI  
6th Floor, Boston Bldg.  
Salt Lake City, Utah 84111  
Attorneys for Smiths

Paul H. Matthews  
HANSON & DUNN  
Attorneys for Image  
175 South West Temple  
Salt Lake City, Utah 84101

Gary D. Stott  
RICHARDS, BRANDT, MILLER  
& NELSON  
50 South Main, 7th Floor  
Salt Lake City, Utah 84144  
Attorneys for Young Electric

Paul S. Felt  
RAY, QUINNEY & NEBEKER  
P.O. Box 3850  
Salt Lake City, Utah 84110  
Attorneys for Dee's, Inc.

and causing the same to be mailed, first class, postage prepaid,  
on the           3rd           day of           October          , 1985.

  
\_\_\_\_\_

SUBSCRIBED AND SWORN to before me this           3rd           day of  
          October          , 1985.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

Residing in the State of Utah

Tab B



EXHIBIT "B"

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

OCT 6 4 17 PM '86

ROBERT H. HENDERSON  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Marveon Sign  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

H. DION HENDY, BY CLERK  
3rd DISTRICT  
CLERK  
*H. Dion Hendy*

---

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

---

TOSHIKO PICKHOVER, et al.,

Plaintiffs,

vs.

SMITH'S MANAGEMENT  
CORPORATION, et al.,

Defendants.

MEMORANDUM IN SUPPORT OF  
MARVEON'S MOTION FOR SUMMARY  
JUDGMENT AGAINST YOUNG  
ELECTRIC

Civil No. C85-4307

Judge Scott Daniels

---

INTRODUCTION

On January 5, 1985, a sign fell off the side of the Smith's Food King at 94th South in Sandy, Utah, and struck and killed plaintiffs' decedent, John Pickhover. The sign had been installed by Marveon Sign Company (Marveon) in 1978. In August, 1981, Young Electric Sign Company (YESCO) bought Marveon's assets, including Marveon's maintenance contracts, including the maintenance contract for the Smith's at 94th South in Sandy, Utah.

000327

In the August, 1981 Purchase Agreement between YESCO and Marveon, YESCO agreed to provide insurance coverage adequate to fully protect Marveon against personal injury or death claims arising out of the ownership, maintenance, use, service, or installation of signs in a minimum amount of \$1,000,000. Between the August, 1981 Purchase Agreement and the accident of January 5, 1985, the maintenance on the sign was performed by YESCO and Marveon had nothing to do with the sign. In July, 1982, the sign came loose from the building and YESCO reattached the sign. YESCO worked on the sign at least three times in 1984, the last time just 54 days before the sign fell and killed John Pickhover.

Marveon has moved the Court for summary judgment in its favor and against YESCO that, in the event any judgment is returned in favor of plaintiffs and against Marveon, Marveon be indemnified by YESCO for the full amount of any such judgment up to \$1,000,000.

#### UNDISPUTED MATERIAL FACTS

1. Marveon installed the sign in August, 1978, six and one-half years prior to the accident sued upon.
2. In August, 1981, Marveon sold its assets, including maintenance contracts, to YESCO pursuant to a Purchase Agreement.

3. The Purchase Agreement between Marveon and YESCO, a true and accurate copy which is attached hereto as Exhibit "A," provides that YESCO would "provide, at its expense, insurance coverage adequate to fully protect [Marveon] against . . . personal injury or death claims arising out of the ownership, maintenance, use, service, transportation, or installation of Displays in a minimum amount of One Million Dollars (\$1,000,000)." (Purchase Agreement, Section 2.a. at page 3.)

4. From and after August 28, 1981, YESCO maintained the sign at the Smith's Food King at 9400 South, in Sandy, Utah and Marveon had nothing to do with the sign.

5. In July, 1982, Dave Wissler, the Smith's Food King Manager at the 94th South store, noticed that the sign in question had become partially detached from the building. YESCO was notified. Mont Anderson, YESCO Service Manager, assigned YESCO service journeymen Michael Thompson and James Malm to the job, and Thompson and Malm went to the Smith's Food King and resecured the sign. (Depo. of Wissler, pp. 7, 11-12, 16-17, 23, 35-36, 40; Depo. of Mont Anderson, pp. 9-17, 34, 42; Depo. of Michael Thompson, pp. 12-13; Depo. of James S. Malm, p. 4; Depo. Ex. 55, 56, 57, 58 and 59, attached hereto.)

6. Approximately 3-1/2 years later, on January 5, 1985, the sign fell off the building and killed John Pickhover.

7. Between August, 1981 and January 5, 1985, Marveon hand nothing to do with the sign. The sign was maintained by YESCO. At least three times in 1984, YESCO did work on the sign, the last time just 54 days before the accident. (See citations to Wissler Depo. in fact 5 above; Depo. of Mark Jacobson, pp. 4-6; Eric Jacobs, pp. 14-15, 11-12, 39-41; Randy Lambert, pp. 4-8; Lee Breeze, 4-5; Terry Saxton, pp. 4-6; Depo. Ex. 36 & 38 attached hereto.)

#### ARGUMENT

##### POINT I

YESCO AGREED TO FULLY PROTECT MARVEON AGAINST PERSONAL INJURY OR DEATH CLAIMS IN A MINIMUM AMOUNT OF \$1,000,000 AND SUMMARY JUDGMENT SHOULD, THEREFORE, BE ENTERED IN FAVOR OF MARVEON AND AGAINST YESCO.

By Section 2.a. of the Purchase Agreement, YESCO unambiguously agreed to provide, at YESCO's expense, insurance coverage adequate to fully protect Marveon against personal injury or death claims arising out of the ownership, maintenance, use, service, or installation of signs up to a minimum amount of \$1,000,000.

The stale, old arguments about who agreed to indemnify whom for whose negligence are irrelevant to the pending motion for summary judgment. The issue is not whether one party agreed to indemnify another party for only the first party's negligence,

for only the second party negligence, or for both the first party and the second party's negligence. On the contrary; YESCO specifically agreed to provide insurance coverage adequate to fully protect Marveon against personal injury or death claims up to \$1,000,000, regardless of whose negligence caused the claim.

Assuming, arguendo, which Marveon vehemently denies, that the death arose out of the original installation in 1978, as opposed to the installation by YESCO in 1982, YESCO, through the Purchase Agreement of 1981, nevertheless agreed to provide insurance coverage adequate to fully protect Marveon against death claims arising out of the ownership, maintenance, use, service, or installation of the sign.

Viewed in the commercial context of the Purchase Agreement, this provision makes eminent good sense. Marveon was going out of the sign business. YESCO was taking over Marveon's pre-established business. Marveon was not interested in litigating, five to ten years down the line, about whether a claim arose out of the sole negligence of YESCO, the sole negligence of Marveon, or the combined negligence of YESCO and Marveon. Marveon wanted insurance coverage that would fully protect Marveon against claims for personal injury or death arising out of the signs, regardless of the apportionment of fault. That is what Marveon bargained for--that is what YESCO agreed to

do. The contract is unambiguous on its face. Marveon's motion for summary judgment that, to the extent plaintiffs obtain any judgment against Marveon, YESCO be required to indemnify Marveon for the full amount of any such judgment up to \$1,000,000 should, therefore, be granted.

#### POINT II

##### THE SUMMARY JUDGMENT SHOULD INCLUDE COSTS AND ATTORNEY'S FEES.

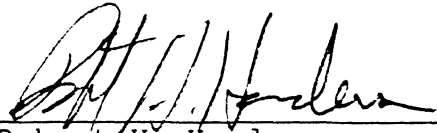
Marveon has also moved the court that the summary judgment include an award of costs and attorney's fees. Returning again to the specific language of the Purchase Agreement, YESCO agreed to "fully protect" Marveon against personal injury or death "claims." This litigation has been protracted and the discovery has been extensive. Approximately 30 depositions have been taken. YESCO promptly tendered the defense of this suit on August 26, 1985. (See Letter of Robert H. Henderson to Gary D. Stott, YESCO's attorney, attached hereto as Exhibit "C.") YESCO summarily rejected the tender. (See Letter of Gary D. Stott attached hereto as Exhibit "D.") Unless Marveon's costs and attorney's fees are paid, YESCO has not provided insurance coverage adequate to fully protect Marveon against this wrongful death claim. Marveon's summary judgment should, therefore, include its costs and attorney's fees.

CONCLUSION

YESCO unequivocally agreed to provide insurance coverage adequate to fully protect Marveon against personal injury or death claims arising out of the ownership, maintenance, use, service, or installation of signs. This case clearly arises out of the ownership, maintenance, use, service, or installation of signs. Marveon's motion for summary judgment should, therefore, be granted that if plaintiffs obtain any judgment against Marveon, YESCO be required to indemnify Marveon for the full extent of any such judgment up to \$1,000,000, and that YESCO pay Marveon's costs and attorney's fees incurred herein.

DATED this 2d day of OCTOBER, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By   
Robert H. Henderson  
Attorneys for Marveon

SCM1905H

AFFIDAVIT OF SERVICE

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE )

DONNA L. CAMPBELL, being sworn, says  
that she is employed in the law offices of Snow, Christensen  
& Martineau, attorneys for Marveon Sign, Inc.  
herein, that she served the attached Motion for Summary Judgment  
Against Defendant Young Electric and Memorandum in Support  
of Marveon's Motion for Summary Judgment Against Young Electric  
in Civil Number C85-4307, Third Judicial District  
Court upon the following parties by placing a true and correct  
copy thereof in an envelope addressed to:

Mark O. Van Wagoner  
VAN WAGONER & STEVENS  
Attorneys for Plaintiffs  
185 South State St., Ste. 550  
Salt Lake City, Utah 84111

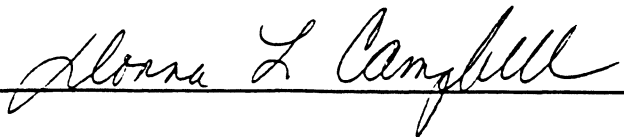
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Attorneys for Young Electric

Paul S. Felt  
RAY, QUINNEY & NEBEKER  
P.O. Box 3850  
Salt Lake City, Utah 84110  
Attorneys for Dee's, Inc.

and causing the same to be mailed, first class, postage prepaid,  
on the 3rd day of October, 1985.

  
\_\_\_\_\_

SUBSCRIBED AND SWORN to before me this 3rd day of  
October, 1985.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

Residing in the State of Utah



EXHIBIT "A"

PURCHASE AGREEMENT

THIS AGREEMENT is entered into this 28 day of AUG., 1981, by and between Marveon Sign Company, a Utah corporation ("Seller"), Young Electric Sign Company, a Utah corporation ("Buyer"), and those persons whose names are set forth on the signature page hereof as all stockholders of the Seller, ("Stockholders").

WITNESSETH:

WHEREAS, Buyer desires to acquire from Seller and Seller desires to convey to Buyer certain assets of the Seller as more particularly described and set forth herein;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, it is agreed as follows:

Section 1. Assignment of Contract Rights and Displays.

a. Seller hereby assigns to Buyer all rights of Seller to renew all sign lease agreements and sign maintenance agreements set forth in Schedule A hereto and all such agreements entered into after the date hereof but prior to closing in the normal course of business (it being intended that as soon as practical, Schedule A shall be updated to include all such additional agreements) and, subject to performance by Buyer of all of its obligations under this Agreement, assigns and transfers to Buyer upon the expiration of each such sign lease agreement all right, title and interest of Seller free and clear of all liens or encumbrances of any kind, in

the Displays which are subject thereto (the "Displays") except for such of the Displays as are subject to transfer to the lessee by reason of a purchase option heretofore granted to such lessee. Such leases or agreements containing a purchase option to the lessee shall be so designated on attached Schedule B. Seller shall be entitled to a commission of fifteen percent of all job contracts pursuant to which no production has commenced prior to the date of closing hereunder but which job contracts have been sold in the ordinary course of business prior to the date of closing hereunder. All such job contracts are listed in Schedule "N" hereto. Seller shall not, directly or indirectly, interfere with or attempt to inhibit Buyer in Buyer's efforts to renew or continue business relationships with customers upon expiration of applicable agreements identified in this paragraph or other paragraphs hereof.

b. It is further agreed that Seller may be unable to transfer title to certain of the leased signs subject to third-party sign location leases as more particularly set forth on Schedule C attached hereto.

c. It is further agreed that those certain leases listed in attached Schedule D are leases which by agreement do not include maintenance or insurance and therefore renewal rights and/or residual payment for title transfer at the end thereof remain the property of Seller

d. Seller will take all steps necessary to allow Buyer to continue Seller's obligations under the lease and maintenance agreements including, where necessary, obtaining the consent of the

user of the Display. All leases and other items of property excluded from purchase and retained by Seller are listed on Schedule D and Schedule E, or in the event not listed on another Schedule attached hereto are excluded from the terms hereof.

Section 2. Assumption of Certain Contractual Obligations.

a. Buyer agrees to satisfy, perform and discharge when due all obligations of Seller (excluding "sales taxes" if any, imposed in respect to the remaining term of sign lease agreements) hereinafter arising under said sign lease agreements and sign maintenance agreements until their respective expiration dates, including but not limited to service, maintenance and replacement of parts, and Buyer further agrees to pay when due all personal property taxes assessed against said Displays in respect of all periods ending subsequent to the effective date hereof and to

provide, at its expense, insurance coverage adequate to fully protect Seller against property damage (including damage to Displays and integral parts) or personal injury or death claims arising out of the ownership, maintenance, use, service, transportations, or installation of Displays in a minimum amount of One Million Dollars (\$1,000,000.00). Such insurance shall include insurance against damage to said displays.

b. Buyer assumes no liabilities or obligations of Seller except as specifically described and set forth herein.

c. Buyer shall have the right to file and Seller agrees to sign reasonable forms of financing statements or security agreements to secure Buyer's interests in the underlying signs.

### Section 3. Inventory.

a. Seller hereby further agrees to sell and assign to Buyer, and Buyer agrees to purchase from Seller, all right, title, and interest of Seller in all inventories of materials, parts and components not included in work in process, owned by Seller as of the date hereof. Said inventories shall be as set forth on Schedule F attached hereto and the total purchase price shall be as set forth on Schedule F. Terms of the purchase price payment shall be as outlined in Section 13 hereof. The original inventory list shall be as of July 31, 1981, and shall be updated at closing.

b. All items listed in the Schedule of inventories of materials, parts, and components shall be in new or usable condition as of the closing date and must be approved by Buyer at closing.

### Section 4. Equipment.

a. Seller hereby agrees to sell and Buyer hereby agrees to purchase those certain items of property, and equipment, including rolling stock as listed on Schedule G, attached hereto. Payment of the purchase price shall not include the assumption of any liabilities, but shall include those other terms and conditions as set forth in Section 13, hereof. The price shall be based on the higher of fair market value or book value for each such item.

b. All such items of property, and equipment, including rolling stock shall be in good working condition and in a reasonably good state of repair as of the closing date.

### Section 5. Work in Process.

a. Seller shall furnish Buyer, prior to closing, a complete list of work in process and Buyer shall finish such work in process for its own account as soon as practicable after the effective date hereof. Buyer shall pay Seller in cash a commission of nine percent (9%) of the contract price of the work in process. Buyer further agrees to pay Seller in cash for such work in process, the cost of direct labor and the cost of material used plus overhead equal to 27% of actual material cost and labor. Upon completion of such work in process and installation at customer location the sign lease agreement and property relating thereto shall be deemed to be the sole asset of Buyer. Work in process is listed by contract and contract price on the attached Schedule H.

b. Seller shall be entitled to a commission of fifteen percent of all job contracts pursuant to which no production has commenced prior to the date of closing hereunder but which job contracts have been sold in the ordinary course of business prior to the date of closing hereunder. All such job contracts are listed in Schedule "N" hereto.

Section 6. Sign Face Molds.

Seller shall furnish to Buyer all sign face molds which are available and which were used in the production of the Displays which are the subject of this Agreement.

Section 7. Failure of Title.

In the event that Seller is unable to pass title to Buyer to any Display as contemplated by this Agreement at the termination of the sign lease agreement applicable thereto, exclusive of Displays

which are the subject of purchase options (for which provisions is made in Section 1 of this Agreement), then Seller shall reimburse Buyer for all maintenance theretofore performed by Buyer with respect to such Display based on costs shown on Buyer's monthly contract status report, and including personal property taxes and sign floater insurance paid, if any, subject, however, to audit by Seller. Buyer's costs shall include labor, materials, and 27% added thereto as overhead.

Section 8. Seller's Real Estate Lease.

a. Buyer hereby agrees to assume, as of the date of closing, that certain real estate lease dated May 1, 1973, by and between Seller and David F. and Bessie B. Sawyer. Buyer agrees to faithfully perform and discharge the terms and conditions of said lease. Buyer and Seller shall also enter into a sublease on terms and conditions of said Sawyer lease.

b. Buyer and Seller shall also enter into a lease on terms and conditions similar to the terms of the Sawyer lease with regard to additional land and improvements at the Marveon shop: The rental for which shall be \$500 per month.

c. The Sawyer lease, assignment and consent of Lessors, and the other lease are attached hereto as Schedule I, J, and K. The consent to assignment by Seller to Buyer shall provide for the ability of Buyer to sublease the Sawyer premises to a third party without the consent of the Sawyers.

Section 9. Contract Rewrites.

In the event that the lessee under any sign lease agreement identified in Schedule A hereof shall desire to rewrite or alter such agreement Buyer may negotiate and enter into a new agreement with such lessee (to which Seller shall not be a party) if Buyer shall pay to Seller the balance owing under the existing sign lease agreement upon the same terms and conditions as were available to the lessee. In the alternative, Buyer may establish a separate agreement with the lessee relating to the changes in the existing agreement so long as the original sign lease agreement, as between Seller and such lessee, shall continue to be in effect and fully performed by such lessee.

Section 10. Employees.

a. Buyer shall have the right, but shall be under no obligation, to hire such employees as it may desire as were, at the date hereof, employed by Seller in connection with Seller's sign business.

b. Buyer agrees to offer employment to Douglas Brown, Ray Draper, and Dennis Remy at not less than their current salaries and benefits and to waive any waiting periods for Buyer's employment benefits, to the extent legally possible to allow ten years seniority in relation to said benefits.

c. Buyer agrees to retain Seller as a consultant with regard to business assumed hereunder and to pay Seller an annual consulting fee of \$50,000, on an equal monthly basis, for the first two 12-month periods after closing and \$25,000 annually during each of the subsequent two 12-month periods. Seller may also continue

to represent Buyer in sales promotion activities, and shall be entitled to standard commissions and approved expenses for any and all contracts negotiated by Seller on behalf of Buyer which such contracts are acceptable to Buyer.

d. Buyer agrees to provide Seller with a copy of its annual audited financial statements until all terms hereof have been performed.

Section 11. Eminent Domain.

In the event that Buyer is required to remove or alter any of the Displays by reason of eminent domain or condemnation proceedings under circumstances whereunder the effect of such removal or alteration would render the effected Display unavailable for transfer to Buyer at the expiration of the applicable sign lease agreement in substantially the condition or location now existing, then, in such event, Seller shall be responsible for the cost of removal or alteration of such Display and shall be entitled to receive any condemnation award in connection with the required removal or alteration. Section 9 hereof shall then apply to reimbursement of Buyer's costs to date of such removal.

Section 12. Billing of Seller's Customers.

Seller shall establish a system and be responsible for billing on all accounts for the benefit of Seller with respect to those accounts wherein Buyer has assumed maintenance responsibilities under Section One hereof. Buyer shall have the right to examine the billing records at any reasonable time.

Section 13. Payment of Purchase Price.



a. The final purchase price shall be allocated in the following categories as per a schedule approved by both parties hereto.

- (1) Inventory
- (2) Office Equipment
- (3) Plant Equipment
- (4) Rolling Stock
- (5) Work in Process - Under Production
- (6) Contracts Sold - No Production Started
- (7) Other Property

Total \$

b. The final purchase price shall be paid with a 30% cash down payment on September 2, 1981, and the balance evidenced by a promissory note in the form attached hereto as Schedule M. The terms of the note will be basically as follows:

Twenty-four equal monthly installments with annual interest calculated at the First Interstate prime rate on the day of closing, adjusted quarterly thereafter beginning, January 1, 1982, but not less than 15% per annum.

## Section 14. Conveyances.

The Seller hereby agrees that at the Closing hereunder, it will deliver to Buyer such bills of sale with covenants of general warranty, endorsements, assignments, and other good and sufficient instruments of transfer, assignment, and conveyance, in form satisfactory to Buyer and its counsel, as shall be effective to

vest in Buyer good and marketable title to all of the properties and assets of the Seller being purchased hereunder, except as to those liens and encumbrances as listed on Schedule L hereto.

Section 15. Delinquent Accounts.

Seller shall notify Buyer of any sign lease agreement or sign maintenance agreement that becomes more than 60 days delinquent in payment, and, Buyer's obligation to any sign lease agreement more than 60 days delinquent shall be suspended upon notice from Seller until the account has been paid current or arrangements satisfactory to Seller have been made for payment of the account. In the event any of the Displays are repossessed by Seller due to the lessee's default, title thereto shall be transferred to Buyer only when (i) Buyer has paid all costs of repossession, in which event Buyer shall be responsible for all further expenses in connection with said Display, or (ii) at the conclusion of probable or existing litigation involving said Display in which event Buyer shall hold and protect said Display in storage for Seller until any such litigation has been concluded, not to exceed 1 year after the expiration of the Underlying Customer Agreement. Seller shall reimburse Buyer for any required reinstallation expense.

Section 16. Free Access to Plants, Properties, and Records.

The Seller shall give to Buyer and to its counsel, accountants and other representatives, and to independent auditors selected by it, free and full access, during normal business hours, throughout the period from the date hereof to the Closing, to all of the Seller's properties, books, contracts, leases, commitments, and

records, and the Seller shall furnish Buyer during this period with all financial and operating data and other information as to the business, properties, and assets of the Seller as Buyer from time to time may reasonably request of the Seller.

Section 17. Conduct of the Seller's Business prior to Closing.

Unless Buyer's prior written consent to a departure from any of the following shall have been obtained, prior to the Closing:

- a. The Seller's business shall be conducted in a good and prudent manner and only in the ordinary course of business;
- b. No contract, contract amendment, lease, agreement, plan, or commitment shall be entered into by or on behalf of the Seller with respect to the properties and assets to be acquired by Buyer hereunder, unless it was entered into in the ordinary course of the Seller's business and does not constitute a breach of any of the representations and warranties set forth in any Section hereof.
- c. The Seller and the Stockholders will use their best efforts to preserve for Buyer the good will of all the firms and persons having business relations with Seller; and
- d. The Seller will duly comply with all laws applicable to it and to the conduct of its business.

Section 18. Actions by the Seller and the Stockholders on and after the Closing.

- a. The Seller and the Stockholders will cooperate, and will use all reasonable efforts to have the officers, directors, and other employees of the Company cooperate, with Buyer at its

request, on and after the Closing Date, in endeavoring to conduct its business.

b. The Seller and the Stockholders agree to use all reasonable efforts to persuade those employees of the Seller that Buyer may designate to become employees of Buyer after the Closing Date.

c. Except as provided in Section 10.c. above, Seller agrees to refer all calls received by Seller for new work including sales leads, maintenance, installation, etc. to Buyer. Seller shall coordinate all such sales activities under Section 10.c. with the appropriate representative of Buyer.

Section 19. The Closing.

The purchase of assets described in this Agreement shall be consummated at Closing to be held at the offices of counsel for Buyer in Salt Lake City, Utah, at 4:00 P.M., local time, on the 2nd day of September, 1981, or at such other place, time, and date as the parties hereto shall mutually agree upon. The date and event of such purchase of assets are, respectively, herein referred to as the "Closing Date" and the "Closing."

Section 19. Representations, Warranties, and Covenants of the Seller.

The Seller and the Stockholders, severally, hereby represent, warrant, and covenant to Buyer as follows:

a. The Seller is a corporation duly organized and in good standing under the laws of the State of Utah. The Seller has the power to own its properties and assets and to carry on its business

as it is now being conducted, and is duly qualified to do business and is in good standing in every jurisdiction in which the nature of its business makes qualification necessary.

b. The Seller has, and on the Closing Date will have, good and marketable title to all assets described in Schedules hereof as being owned by it. All such assets are subject to no liens, mortgages, pledges, encumbrances, or charges of any kind except those described in Schedule L.

c. Except as provided in Schedule L, the Seller is not a party to any contract adversely affecting assets being purchased or contracts being assumed.

From the date hereof to and including the Closing Date, the Seller will not enter into any such contract or contracts without the prior written consent of Buyer. The Seller has performed in all material respects all obligations required to be performed by it to the date hereof and is not in default in any material respect under any agreements, leases, or other documents to which it is a party and to which Buyer is succeeding or assuming obligations hereunder.

d. There are no actions, suits, or proceedings pending or threatened against or affecting the Seller at law, in equity or admiralty, or before or by any federal, state, municipal, or other governmental department, commission, board, bureau, agency, or instrumentality, domestic or foreign, that involve any claim against the assets being purchased or contracts being assumed, unless disclosed herein.

e. In all material respects, the Seller has performed and abided by all the obligations required to be performed by it to the date hereof with respect to contracts assumed by Buyer, and will continue to abide by and perform them up to and including the Closing Date, and the Seller is not in default and to the extent that it will be materially affected adversely under a license, permit, order, authorization, grant, agreement, lease, or other document, order, or regulation to which it is a party or by which it is bound, affecting such contracts.

f. The Seller has complied in all material respects with all applicable statutes and regulations of any governmental authority having jurisdiction over it or applicable to its business.

g. In the conduct of its business during the preceding three years and as now operated, the Seller has not infringed any United States or foreign patents of others. The Seller owns or possesses adequate license or other rights to use all trademarks, trade names, and copyrights that are employed in the conduct of its business and has not received any notice of conflict with any asserted rights of others that remain in effect.

h. By appropriate vote of its Board of Directors and by either the unanimous written consent of its stockholders or their unanimous vote at a meeting duly called, convened, and held, all in accordance with law and its Articles of Incorporation and Bylaws, the Seller has full power to execute and perform this Agreement and to transfer its properties and assets as herein provided, and such execution and performance does not conflict with any provisions of

its Articles of Incorporation or Bylaws or with any contract to which it is a party or to which it is subject.

i. None of the Seller's properties and assets to be transferred to Buyer pursuant to this Agreement is subject to any restriction or limitation prohibiting, restricting, or requiring any consent to such transfer unless specifically denoted herein.

j. Attached hereto as Schedule N and hereby made a part hereof is a detailed schedule of all of the Seller's jobs that, as of the date hereof, had been sold in the ordinary course of business of the Seller and upon which production had not commenced showing, with respect to each such job, the job number, the name of the purchaser, (lessee), and the total contract price.

k. Each of the representations and warranties set forth in this Section shall be true at and as of the time of Closing with the same force and effect as though made at and as of the time of Closing.

Section 21. Representations, Warranties and Covenants of Buyer.

Buyer hereby represents, warrants, and covenants to the Seller and the Stockholders as follows:

a. Buyer is a corporation duly organized, validly existing, and in good standing under the laws of the State of Utah, and is duly qualified to do business as a foreign corporation in all jurisdictions where it does business.

b. Purchaser has full power, in accordance with law, to execute and perform this Agreement, and such execution and performance does not conflict with any provisions of its Articles

of Incorporation or bylaws, as amended to the date hereof, or with any contract to which it is a party or to which it is subject. The Board of Directors of Buyer has authorized, or before the Closing will have authorized, this Agreement, the transactions contemplated herein, and the execution and delivery hereof.

c. Each of the representations and warranties set forth in this Section shall be true at and as of the time of Closing with the same force and effect as though made at and as of the time of Closing, and shall survive the Closing.

Section 22. Conditions Precedent to the Buyer's Obligations.

All obligations of Buyer to be discharged under this Agreement at the Closing are subject to fulfillment prior to or at the Closing of each of the following conditions, unless expressly waived in writing by Buyer at any time prior to the Closing:

a. Buyer shall not have discovered any material error, misstatement, or omission in their representations, warranties, and covenants made by the Seller and the Stockholders herein.

b. The representations, warranties and covenants of the Seller and the Stockholders set forth herein shall be deemed to have been made again at and as of the time of Closing and then shall be true in all material respects, except as modified as of the time of Closing to the extent necessary to reflect intervening transactions expressly permitted hereunder; the Seller and the Stockholder shall have performed and complied with all the terms, covenants, and conditions required by this Agreement to be performed by them prior to or at the Closing.



c. The Bulk Sales Law of the State of Utah has been complied with or is inapplicable to this transaction and Seller hereby indemnifies Buyer with regard to any claims thereunder.

d. The schedules attached hereto shall indicate all leases, signs, equipment, inventory, and other assets pledged to secure any debt of Seller. Buyer shall have the right to review all loan documents and pledge agreements relating to such assets and debt and shall be entitled to satisfy itself, prior to closing, as to the ability of Seller to pay off such debt so as to enable Seller to pass title to such assets to Buyer.

Section 23. Conditions Precedent to the Obligations of the Seller and the Stockholders.

All obligations of the Seller and the Stockholders to be discharged under this Agreement are subject to the fulfillment, prior to or at the time of Closing, of each of the following conditions, unless waived in writing by the Seller and the Stockholders at any time prior to the Closing:

a. Buyer's representations and warranties set forth herein shall be deemed to have been made again at and as of the time of the Closing and then shall be true in all material respects. Buyer shall have performed and complied with all covenants, agreements, and conditions required by this Agreement to be performed by it prior to or at the time of Closing.

Section 24. Nature and Survival of Representations, Warranties, Covenants, and Agreements.

Buyer, the Seller, and the Stockholders agree that:

1. Their respective representations and warranties set forth in this Agreement shall survive the Closing and thereafter shall be fully effective and enforceable, and shall not be affected by any investigation, verification, or approval by any party hereto or by anyone on behalf of any such party;

2. Their respective covenants and agreements set forth in this Agreement, except those covenants and agreements that are required, expressly by this Agreement to be fully kept, performed, and discharged on or before the Closing, shall survive the Closing and thereafter shall be fully effective and enforceable;

3. After the Closing and prior to any dissolution of the Seller, the representations and warranties and the surviving covenants and agreements herein made by the Seller shall be binding upon, performed by, and enforceable against the Seller, except that all the costs of such performance shall be borne and paid by the Stockholders;

4. In the event of dissolution of the Seller, all representations and warranties herein made by either the Seller, the Stockholders, or both and the surviving covenants and agreements herein made by either the Seller, the Stockholders, or both, shall be deemed to be assumed by the Stockholders;

5. No liability of the Seller for or by reason of breach of any of its said representations, warranties, covenants, and agreements shall be deemed to be a liability of the Seller assumed by Buyer hereunder, but, on the contrary, shall remain the

liability of the Seller, the Stockholders, or both, as provided herein.

Section 25. Employment and Noncompetition.

a. Buyer shall not have any obligations with respect to hiring or any other matters as to present or past employees of the Seller.

b. The Seller and all Stockholders of the Seller shall enter into a noncompetition agreement in the form attached hereto as Schedule O.

Section 26. Miscellaneous.

a. The Seller, or, after its dissolution, its surviving directors, trustees, or receiver, and the Stockholders, at any time and from time to time after the Closing Date, upon the request of Buyer and without further consideration, will do, execute, acknowledge, and deliver all such further actions, deeds, bills of sale, assignments, transfers, conveyances, powers of attorney, and assurances, and will take such other action, as reasonably may be required by Buyer, to assign, convey, transfer, and deliver to, and vest in, Buyer and put it in possession of, and protect its right and title to, interest in, and enjoyment of, the properties and assets of the Seller intended to be assigned, conveyed, transferred, and delivered pursuant to this Agreement.

b. Subject to the terms, provisions, and conditions hereof, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

c. Any notice, request, instruction, or other document to be given hereunder to any party shall be in writing, delivered personally or sent by registered mail or certified United States Air Mail, postage prepaid, or telegram as follows:

Addresses of the Parties:

Young Electric Sign Company  
c/o Thomas Young, Jr. President  
P.O. Box 25728  
Salt Lake City, UT 84125

Marveon Sign Company  
c/o Glen Jerry Brown  
4875 Knollwood Drive  
Ogden, Utah 84403

Any party may change his or its address for purposes of this paragraph by giving notice of change of address to the other parties in the manner herein provided for giving notice.

d. This instrument contains the entire agreement between the parties hereto with respect to the transactions contemplated hereby and shall not be changed or terminated except by a written instrument signed by the parties hereto.

e. All exhibits and Schedules attached hereto are incorporated herein.

f. This Agreement is declared to have been made under the laws of the State of Utah.

g. The section and other headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

h. This Agreement may be executed in any number of counterparts, and all of these counterparts together shall constitute one and the same Agreement.

i. The invalidity or unenforceability of any provision hereof shall not affect nor impair any other provision hereof.

j. The failure of any party to enforce the provisions of this Agreement shall not constitute a waiver unless specifically stated in writing, signed by the party whose rights are deemed waived, regardless of a party's knowledge of a breach hereunder.

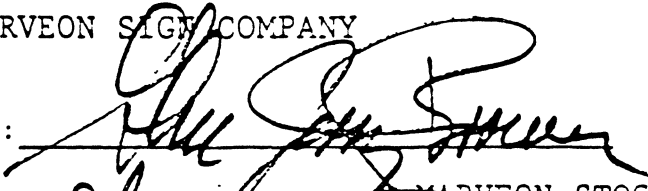
k. In the event of default, the defaulting party shall be liable for all reasonable costs of enforcement including attorney's fees.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

MARVEON SIGN COMPANY

YOUNG ELECTRIC SIGN COMPANY

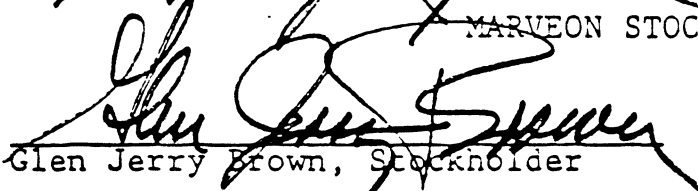
By:



By:



MARVEON STOCKHOLDERS:

  
Glen Jerry Brown, Stockholder  
Marva S. Brown, Stockholder

1           A       YES, YES.

2           Q       SO SOME OF THE SIGN WAS STILL FLUSH AGAINST THE  
3 BUILDING?

4           A       THE TOP PART OF THE SIGN WAS -- WELL -- WELL, I  
5 DON'T KNOW IF IT WOULD BE FLUSH. IT WOULD BE MAYBE AN INCH  
6 OR SO AWAY, BUT --

7           Q       BUT MUCH CLOSER THAN THE BOTTOM RIGHT?

8           A       MUCH CLOSER.

9           Q       SO THE BOTTOM PART IS THE PART THAT CAME 6 OR 7  
10 INCHES AWAY FROM THE BUILDING?

11          A       YES.

12          Q       NOW, YOU SAID A CUSTOMER PARKED IN THE FIRE LANE?

13          A       A CUSTOMER HAD PARKED IN THE FIRE LANE. IT'S  
14 PAINTED RED SO -- THE LAW STATES YOU CANNOT PARK THERE IN  
15 CASE OF A FIRE OR AN EMERGENCY, BUT I'M SAYING THEY DID.  
16 THEY PULLED UP AND PARKED THERE. AND AS THEY GOT OUT OF  
17 THEIR CAR, THEY NOTICED THE SIGN AND CALLED MY ATTENTION TO  
18 IT.

19          Q       THAT FIRE LANE WHERE THE CUSTOMER HAD PARKED HIS  
20 CAR WAS WHERE PEOPLE WOULD WALK INTO THE STORE?

21          A       WOULD WALK IN NOW.

22          Q       BECAUSE THAT'S WHERE THE ENTRANCE IS NOW?

23          A       UM-HM. BUT BACK THEN IT WAS JUST A FIRE LANE  
24 RIGHT IN FRONT OF THE STORE, AND IT WAS ALL PAINTED RED, LIKE  
25 I SAY. WE HAD SIGNS OUT THAT SAID, "NO PARKING. FIRE LANE."

1 Q OKAY. LOOK, ALL WE'RE TRYING TO GET IS WHAT YOU  
2 RECALL.

3 A YES.

4 Q YOU DON'T REMEMBER DOING THAT?

5 A I -- YOU'RE SAYING I DON'T REMEMBER CALLING THE  
6 SIGN COMPANY?

7 Q RIGHT.

8 A I DON'T REMEMBER CALLING THE SIGN COMPANY.

9 Q YOU THINK THAT EITHER YOU DID OR CAROLYN DID?

10 A CORRECT.

11 Q BUT YOU'RE NOT ABLE TO TELL ME NOW HOW THAT  
12 HAPPENED?

13 A CORRECT.

14 Q ALL RIGHT. DO YOU HAVE A MEMORY OF SOME SIGN  
15 COMPANY COMING OUT TO THE BUILDING AND FIXING WHAT THE  
16 CUSTOMER CALLED YOUR ATTENTION TO?

17 A YES, I DO BECAUSE SOME SIGN COMPANY CAME OUT AND  
18 FIXED THE SIGN BECAUSE I REMEMBER THE SIGN BEING REPAIRED.

19 Q DO YOU REMEMBER WHO IT WAS THAT CAME?

20 A I DON'T.

21 Q CAN YOU REMEMBER THEM BY NAME?

22 A THE ONLY THING THAT I'M GOING OFF OF IS MY  
23 PREVIOUS EXPERIENCE WITH IT AT THAT TIME. AT THAT TIME I  
24 THINK IT WAS YOUNG SIGN COMPANY THAT HAD THE CONTRACT, AND  
25 THAT'S THE ONLY THING I'M SAYING. I CAN'T SWEAR TO IT

1 BECAUSE I CAN'T REMEMBER EXACTLY.

2 Q WHAT MAKES YOU THINK IT WAS YOUNG?

3 A BECAUSE I JUST -- I'M GOING ON MY PREVIOUS  
4 MEMORY, AND I THINK IT WAS YOUNG SIGN COMPANY THAT HAD THE  
5 CONTRACT AT THE TIME.

6 Q DID YOU KNOW ANY OF THE INDIVIDUALS FROM YOUNG  
7 SIGN COMPANY THAT FROM TIME TO TIME OR ANY TIME DID COME TO  
8 THE 94TH SOUTH STORE?

9 A NO, I DIDN'T KNOW ANY INDIVIDUALS PERSONALLY OR  
10 KNOW ANY OF THEM.

11 Q SO YOU DIDN'T HAVE THAT KIND OF A WORKING  
12 RELATIONSHIP?

13 A NO, NO. IT WAS SOMETHING THAT -- FOR EXAMPLE,  
14 LATER ON THE CONTRACT CHANGED COMPANIES, AND THAT'S WHY I SAY  
15 I CAN'T REMEMBER EXACTLY WHETHER IT'S YOUNG SIGN COMPANY  
16 BECAUSE IT CHANGED COMPANIES. THE OTHER SIGN COMPANY CAME  
17 OUT ON A REGULAR BASIS TO CHECK THE LIGHTS AND EVERYTHING, SO  
18 I CAN REMEMBER THAT GENTLEMAN BECAUSE HE CAME OUT ON A  
19 REGULAR BASIS AT THIS TIME. IF THERE WASN'T ANY NECESSARY  
20 REPAIRS ON IT, NO ONE CAME OUT. AND THE CONTRACT -- AND I  
21 DON'T KNOW HOW THE CONTRACT READ, IF THEY WERE SUPPOSED TO  
22 COME OUT AND CHECK EVERYTHING OR NOT.

23 Q SO THE PEOPLE THAT CAME OUT AND CHANGED THE  
24 LIGHTS WERE IMAGE?

25 A WERE IMAGE, YES.



1 Q HOW ABOUT JERRY BROWN?

2 A NO.

3 Q ALL RIGHT. YOU'VE TOLD US THAT YOU THINK THAT  
4 YOUNG SIGN COMPANY HAD THE MAINTENANCE CONTRACT. YOU'VE  
5 TOLD US THAT IMAGE DID THE LIGHTS. CAN YOU TELL US ABOUT ANY  
6 OTHER SIGN COMPANY THAT, DURING YOUR THREE YEARS THERE, HAD  
7 ANYTHING TO DO WITH THE SIGNS ON THE SMITH'S FOOD KING AT  
8 94TH SOUTH?

9 A NOT TO MY KNOWLEDGE THAT ANYONE ELSE WAS INVOLVED  
10 WITH. IN FACT, AT THE TIME I DON'T THINK IMAGE WAS INVOLVED,  
11 NOT TO MY KNOWLEDGE. I'M SAYING THAT WAS LATER.

12 Q WHEN THEY CHANGED THE LIGHTS?

13 A WHEN THEY CHANGED THE LIGHTS WAS WHEN I WAS AT  
14 ANOTHER STORE.

15 Q OH, REALLY. SO DURING THE TIME THAT YOU WERE THE  
16 MANAGER AT THE 94TH SOUTH STORE IN NOVEMBER OF '79 UNTIL YOU  
17 LEFT THAT STORE IN AUGUST, SEPTEMBER 1982, YOU'RE NOT AWARE  
18 OF IMAGE HAVING ANYTHING TO DO WITH THE SIGNS AT 94TH SOUTH?

19 A NO, NO. LIKE I SAY, THE ONLY TIME I WAS AWARE  
20 OF THE IMAGE SIGN COMPANY WAS AT THE OTHER STORE.

21 Q SO I UNDERSTAND YOUR ANSWER --

22 A I'M SORRY.

23 Q NO, THAT'S FINE.

24 SO THE ONLY SIGN COMPANY YOU HAVE A RECOLLECTION  
25 OF DEALING WITH DURING THE TIME YOU WERE THE MANAGER OF THE

1 94TH SOUTH STORE FROM NOVEMBER OF '79 UNTIL AUGUST,  
2 SEPTEMBER OF 1982, WAS YOUNG ELECTRIC SIGN COMPANY?

3 A YES.

4 Q WHAT'S YOUR EDUCATIONAL LEVEL, SIR?

5 A I GRADUATED FROM HIGH SCHOOL.

6 Q WHAT YEAR?

7 A IN 1963, HIGHLAND HIGH SCHOOL.

8 Q WHAT'S YOUR AGE?

9 A FORTY-ONE.

10 Q WOULD YOU MIND GIVING US YOUR HOME PHONE NUMBER  
11 SO WE CAN GET YOU IF WE NEED YOU FOR TRIAL?

12 A 255-0259.

13 Q AND YOU DON'T HAVE ANY PLANS OF MOVING OUT OF THE  
14 SALT LAKE VALLEY, DO YOU?

15 A NO.

16 Q NOW, WHEN DID YOU FIRST BECAME AWARE THAT THE  
17 SIGN DID, IN FACT, FALL OFF THE 94TH SOUTH SMITH'S FOOD KING  
18 ON JANUARY 5, 1985?

19 A FROM THE NEWS MEDIA. IT WAS ON THE TELEVISION.

20 Q SO RIGHT AWAY?

21 A YES.

22 Q AND DID YOU EVER HAVE ANY DISCUSSION WITH ANY  
23 PERSON EMPLOYED BY SMITH'S ABOUT THAT SIGN HAVING FALLEN OFF?

24 A I HAD JUST STATED TO ONE OF THE SUPERVISORS THAT  
25 I HAD REMEMBERED THE SIGN HAD COME LOOSE AND I HAD HAD

1 OUTSIDE. I DIDN'T CHECK THE INSIDE.

2 Q TELL ME WHAT YOU DID TO CHECK THE SIGN OUTSIDE.

3 A AFTER HE HAD STATED THAT HE HAD FIXED THE SIGN  
4 AND EVERYTHING WAS DONE, I WENT OUTSIDE AND CHECKED THE SIGN.  
5 AND IT WAS AGAIN BACK AGAINST THE WALL, THE PART OF THE OUT-  
6 SIDE OF THE BUILDING.

7 Q YOU DIDN'T ASK THE PEOPLE WHO WERE THERE THAT  
8 WERE REPAIRING IT EITHER WHY IT HAD COME LOOSE OR WHAT THEY  
9 HAD DONE TO SECURE IT TO MAKE SURE IT DIDN'T COME LOOSE  
10 AGAIN?

11 A NO, I DIDN'T. I TOTALLY RELIED ON THEIR ABILITY  
12 TO REPAIR.

13 MR. BULLOCK: THEIR EXPERTISE?

14 THE WITNESS: YES.

15 Q (BY MR. VAN WAGONER) IS MR. BULLOCK YOUR LAWYER  
16 FOR THIS LAWSUIT? DO YOU HAVE A LAWYER?

17 A NO.

18 Q WAS THERE ACCESS IN THE BUILDING FOR YOU TO BE  
19 ABLE TO GO UP AND SEE HOW THE SIGN WAS FASTENED?

20 A THERE'S A CATWALK THAT WAS UP ON THAT PART OF THE  
21 BUILDING FOR SHOPLIFTING, AND YOU COULD WALK UP AND SEE.  
22 APPROXIMATELY IT WOULD BE 5 TO 6 FEET FROM THE CATWALK TO THE  
23 FRONT PART OF THE BUILDING, WHICH YOU COULD SEE. YOU KNOW,  
24 YOU COULD SEE WHERE IT WOULD BE FASTENED. BUT THE --

25 Q ARE YOU TELLING ME YOUR RECOLLECTION IS YOU COULD

## EXAMINATION

BY MR. MATTHEWS:

Q DO I UNDERSTAND CORRECTLY THAT THE ONLY SIGN COMPANY YOU CAN RECALL DEALING WITH AT THE TIME YOU WERE MANAGER OF THE SANDY STORE WAS YESCO, YOUNG ELECTRIC SIGN COMPANY?

A YES.

Q AND WITH REGARD TO IMAGE --

(A DISCUSSION WAS HAD OFF THE RECORD.)

Q (BY MR. MATTHEWS) I JUST HAVE ONE MORE QUESTION, JUST SO I'M CLEAR ON THE MATTER, AND THAT IS THAT ALTHOUGH IMAGE NATIONAL MAY OR MAY NOT HAVE HAD SOME KIND OF CONTRACT WITH SMITH'S DURING THE TIME YOU WERE MANAGER AT THE SANDY STORE, IS IT TRUE THAT YOU DON'T REMEMBER HAVING ANY CONTACT WHATSOEVER WITH IMAGE DURING THAT TIME?

A THAT'S -- THAT'S CORRECT.

MR. MATTHEWS: OKAY. THANK YOU. I DON'T HAVE ANY MORE QUESTIONS.

## EXAMINATION

BY MR. FELT:

Q MR. WISSLER, YOU SAY THAT THE ONLY SIGN COMPANY YOU REMEMBER DURING YOUR TENURE AS THE STORE MANAGER AT THE 9400 SOUTH STORE IS YOUNG ELECTRIC SIGN COMPANY. CAN YOU

1 TELL ME WHAT YOU REMEMBER ABOUT YOUR DEALINGS WITH THEM?

2 A JUST -- I'M JUST GOING ON THE RECOLLECTION THAT  
3 THAT'S THE COMPANY THAT WAS DEALING WITH SMITH'S AT THE TIME  
4 THAT I REMEMBER.

5 Q SO DO YOU HAVE ANY SPECIFIC MEMORY OF CALLING  
6 THEM FOR ANY REASON OR SEEING THEM ON THE STORE PREMISES FOR  
7 ANY REASON?

8 A THEY WOULD HAVE BEEN IN THE STORE ON DIFFERENT  
9 OCCASIONS FOR DIFFERENT THINGS OF CHANGING THE LIGHTS.  
10 THAT'S WHY I SAY I DON'T KNOW IF IMAGE WAS INVOLVED WITH IT  
11 OR WHO WAS AT THAT TIME.

12 WHERE YOU RUN INTO THE PROBLEM IS THE CONTRACT.  
13 LIKE I STATED TO THESE OTHER GENTLEMEN, WHEN IT'S ON A  
14 CONTRACT, YOU HAVE A TENDENCY TO THINK THAT SOMEONE'S GOING  
15 TO COME OUT AND TAKE CARE OF IT, AND INVOICES WEREN'T  
16 NECESSARY AT THE TIME. AND AS LONG AS YOU COULD PHYSICALLY  
17 SEE THAT THE PROBLEM WAS CORRECTED, YOU BASICALLY DIDN'T DO  
18 THAT.

19 Q WHAT I'M ASKING YOU IS IF YOU HAVE A PRESENT  
20 MEMORY OF SEEING ANYONE FROM YESCO, THAT'S YOUNG ELECTRIC  
21 SIGN COMPANY, ON THE STORE PREMISES DOING ANY WORK.

22 A PRESENT TIME?

23 Q YES.

24 A YES, I DID.

25 Q AND WHAT IS YOUR PRESENT MEMORY OF WHAT THEY WERE

1 MR. BULLOCK: IS THE ANSWER YES?

2 THE WITNESS: YES.

3 Q (BY MR. FELT) AND DO YOU REMEMBER ANY TIME  
4 CAROLYN INSTRUCTING YOU TO CALL YOUNG ELECTRIC SIGN COMPANY  
5 TO GET THEM TO THE PREMISES TO DO THE REPAIR?

6 A I CAN'T REMEMBER IF SHE CALLED OR I CALLED. I  
7 JUST CAN'T REMEMBER.

8 Q BUT YOU DO REMEMBER, IN RESPONSE TO SOME OF THOSE  
9 PROBLEMS, SEEING YOUNG ELECTRIC SIGN COMPANY PERSONNEL COME  
10 AND DO THE REPAIR?

11 A THAT'S REALLY -- THAT'S WHAT I'M SAYING. I'M  
12 GOING OFF MEMORY AS FAR AS IF I KNOW -- I'M JUST SAYING THAT  
13 TO MY BEST KNOWLEDGE, THAT YOUNG SIGN COMPANY HAD THE CONTRACT.  
14 AND I CAN'T SAY YES, ON NOVEMBER 13TH YOUNG SIGN COMPANY  
15 CAME AND --

16 Q I'M NOT ASKING YOU TO DO THAT. I'M JUST ASKING  
17 YOU TO SEARCH YOUR MEMORY ABOUT WHAT YOU REMEMBER ABOUT WHO  
18 RESPONDED TO THESE CALLS TO FIX THE SIGNS, AND I THINK YOU  
19 TOLD ME IN YOUR EARLIER TESTIMONY IT WAS THE PERSONNEL FROM  
20 THE YOUNG ELECTRIC SIGN COMPANY.

21 A YES. THAT'S JUST TO THE BEST OF MY KNOWLEDGE.

22 Q OKAY. I'M UNCLEAR ON YOUR TESTIMONY ABOUT WHAT  
23 YOU COULD SEE ABOUT THE INSTALLATION OF THAT SIGN FROM THE  
24 INTERIOR OF THE BUILDING. YOU TOLD ME YOU COULD GET UP ON A  
25 CATWALK THAT WAS USED FOR STORE SURVEILLANCE AND THAT WOULD

1 A Above it?

2 Q No. Up here toward about the top third of the form  
3 there is a --

4 A Yes. That is mine.

5 Q Under the word "material" that's typed in all caps?

6 A Right. Yes, it is.

7 Q Why did you sign that?

8 A Completion of the work order.

9 Q Your signature in that block means that the work to  
10 be done pursuant to that work order has been completed?

11 A Right.

12 Q Which copy of the multi-copy form would Exhibit 55  
13 be?

14 A The blue.

15 Q Who wrote the words "pickup truck" in "under invoice  
16 as follows?"

17 A Mike Thompson.

18 Q After the salesclerk makes up the white copy of the  
19 work order does it then come to you?

20 A Right.

21 Q And you assign the workmen to go out and do the  
22 work?

23 A Right.

24 Q Who did you assign to do this job?

25 A Mike Thompson.

1 Q Anybody else?

2 A I can't recognize the employee number, no. I don't  
3 know.

4 Q Oh, I see. You're referring down there under the  
5 all caps "notes" there is a block employee number?

6 A Right.

7 Q And then there is two employee numbers indicated  
8 underneath that?

9 A Right.

10 Q Do you recognize one of those two employee numbers?

11 A I recognize the top one.

12 Q That's Mike Thompson?

13 A Right.

14 Q Is he still employed with YESCO?

15 A Yes, he is.

16 Q Now, is that your signature that appears just to the  
17 right of the all caps "notes" about two-thirds of the way down  
18 the page?

19 A Yes, it is.

20 Q What does your signature there mean?

21 A It's an indication that he filled out the block  
22 where stating what day he did the work and how much time was  
23 involved.

24 Q He being Mike Thompson?

25 A Right.



1 Q So the entries under time and date are Mike  
2 Thompson's entries?

3 A Right.

4 Q That is, he wrote in 7/2/82?

5 A Right.

6 Q That means that's the day that he did the work  
7 indicated on the work order?

8 A That's the date it was completed.

9 Q Is that your signature that appears just above the  
10 all caps "material transfer number?"

11 A Yes, it is.

12 Q What does your signature there mean?

13 A That's an indication that there was no material  
14 used.

15 Q No material used?

16 A There was no material used.

17 Q Now, is that your handwriting where it says  
18 "resecured building sign?"

19 A No, it isn't.

20 Q Who wrote that?

21 A I don't know. I don't know for sure.

22 Q Who wrote "readjusted time clock?"

23 A Looks like my writing.

24 Q Yours?

25 A Yes.

1 Q Can you tell what the writing is over there  
2 alongside of the page that's running up the side of the page?

3 A Where are you referring to?

4 MR. MOHRMAN: If he can see it on that copy, Bob.

5 BY MR. HENDERSON:

6 Q Yeah. Let me hand you mine.

7 A That appears to be the date that that work order was  
8 priced. We document that the day that the sign or that the  
9 work order was priced out. I think it says pricing and then  
10 the date.

11 Q Looks like about July 15th?

12 A Yeah.

13 Q Is pricing something that's normally done after the  
14 work is completed?

15 A Right.

16 Q Is pricing the same thing as deciding how much  
17 you're going to bill the customer for the work you performed?

18 A Yes.

19 Q Whose handwriting is the word "completed?"

20 A Mike Thompson.

21 Q Can you tell from looking at Exhibit 55 or 56 who it  
22 was that prepared the work order, sales person that is?

23 A Shirley McCandless.

24 Q How can you tell on it?

25 A Where it says "order prepared by" SM, the initials

1 S.I typed in.

2 Q That's Snirley McCandless?

3 A Yes.

4 Q Is she still employed with Young?

5 A Yes.

6 Q Do I understand you correctly that for the  
7 readjusting of the time clock and for the resecuring of the  
8 building sign to the building that no materials were used?

9 A According to the work order there was no material  
10 transfer number written in. That's an indication that there  
11 was no materials used on the job.

12 Q Now, down at the very bottom of Exhibit 55.

13 A Yes.

14 Q Where it says "YESCO rep" in all caps?

15 A Yes.

16 Q Whose signatures are those?

17 A From this copy I can't tell.

18 Q Does it look like Mike?

19 A It looks like it could be, yes.

20 Q Any other one you don't know?

21 A I don't know.

22 Q What does block "YESCO rep" mean?

23 A That's the representatives of Young Sign Company  
24 that worked on this particular job.

25 Q That actually did the work at the location

000369

1 indicated?

2 A Right.

3 Q And the signature over there at the lower right-hand  
4 corner is what?

5 A That's the signature of the customer stating that  
6 the job had been completed to their satisfaction.

7 Q Let's have you look at Exhibit 58 for just a minute.  
8 What is it?

9 A Okay. That's a cost review stating how much time  
10 was actually involved and if any materials were used, which  
11 there was none.

12 Q This is a Young Electric Sign Company document?

13 A Yes, it is.

14 Q Is it one that's customarily prepared after the  
15 completion of the work order?

16 A Yes, it is.

17 Q By looking at Exhibit 58 can you now tell me who the  
18 other workman was that you sent to the job at the Smith's Food  
19 King at 94th South and 2039 East?

20 A Appears to be Halm, J.S. That would be Jim Halm.

21 Q Is he is still employed with Young?

22 A Yes, he is.

23 Q From looking at Exhibit 58 can you tell how much was  
24 charged Smith's for the job indicated on the work order that's  
25 Exhibits 55 and 56?

1 A Yes, I can.

2 Q How much?

3 A Forty-eight dollars.

4 Q And do you arrive at that conclusion from the  
5 handwritten entry "two man hours forty-eight?"

6 A Yes.

7 Q What's the purpose of the entries under the column  
8 total cost that looks like it totals forty-one dollars and nine  
9 cents?

10 A Okay. That's total -- that's our cost plus our  
11 overhead. And then there is a figure used divided into that  
12 figure that gives us that number forty-one zero nine and that's  
13 a figure that we go by.

14 Q Your total cost for labor for that job was  
15 twenty-two dollars and eighty-five cents?

16 A With overhead.

17 Q You mean you added overhead to the --

18 A Our total cost without overhead is seventeen dollars  
19 and eighty-five cents. With overhead it's twenty-two dollars  
20 and eighty-five cents.

21 Q All right. I'm with you. How do you get to the  
22 forty-one zero nine?

23 A 22.85 is divided by .556.

24 Q Is that decimal that you just stated something that  
25 appears somewhere on the face of this document?

1 A No, it is not.

2 Q You just happen to know that?

3 A Right.

4 Q So that little mathematical operation gives you the  
5 total forty-one dollars and nine cents?

6 A Right.

7 Q What's the significance of the forty-one dollars and  
8 nine cents?

9 A That's to allow us to make our margins.

10 Q Okay. What does it mean in terms of what you're  
11 going to bill the customer, if anything?

12 A Well, it's just a figure that we go by that we like  
13 to see whether or not how we are comparing with the job if we  
14 are making money or if we are not. That's all that is, it's  
15 just an indication to let us know how we are doing.

16 Q The way you're going to bill the customer was simply  
17 computed by two man hours at what, apparently twenty-four  
18 dollars an hour for a total of forty-eight?

19 A Right.

20 Q Now, do you see anything on Exhibit 58 that  
21 indicates to you that you billed Smith's for any materials for  
22 that job?

23 A No, we did not.

24 MR. MATTHEWS: Did I understand correctly you didn't  
25 bill Smith's or you just don't see anything here that would

000372

1 indicate that?

2 THE WITNESS: He asked if we had billed Smith's for  
3 any materials as a indication on this job cost review and there  
4 is no indication that we did.

5 BY MR. HENDERSON:

6 Q In fact, the indication is that you did not, right?  
7 You did not bill them for materials?

8 A Right. No materials were billed.

9 Q Just labor?

10 A Just labor.

11 Q Have you got Exhibit 59 there, sir?

12 A Yes.

13 Q What's Exhibit 59?

14 A That's the invoice that's sent to the customer.

15 Q In this case the customer being Smith's?

16 A Yes.

17 Q For the work performed pursuant to the work orders  
18 that's Exhibits 55 and 56?

19 A Right.

20 Q Namely, fixing the time clock and resecuring the  
21 sign to the building?

22 A Yes.

23 Q A total of forty-eight dollars for labor?

24 A Yes.

25 Q Now, after Halm and Thompson came back from doing

1 verifies that the work stated on the order is to be done. He  
2 signs the order prior to the work, we go ahead and do the work.  
3 We go back in after the work is completed and he signs it  
4 whether he is satisfied with the job.

5 Q So he signs twice then?

6 A Correct.

7 Q And would 56 be the copy he signs initially and 55  
8 the copy he signs afterwards? Am I jumping ahead?

9 A Correct. Fifty-six is the white copy, that's the  
10 first copy signed.

11 MR. BULLOCK: It's probably no surprise to anybody  
12 but the signature on the right-hand side looks extremely  
13 similar to the signature of David Whistler on a sworn statement  
14 he gave my office. So probably everybody knows that, but it's  
15 not really that clear.

16 MR. HENDERSON: It's nice to hear you say it.

17 BY MS. WALTON:

18 Q And a copy of this would be left with the customer?

19 A Correct.

20 Q If a channel iron and through bolts had been used to  
21 repair this sign would it show up as material?

22 A Yes, it would.

23 Q Do you know the difference in cost between using a  
24 lag screw into a stud and using channel iron and through bolts  
25 if one corner of the sign had come loose?



1 that night was secured?

2 A Correct.

3 Q Do you know what caused that sign to fall down?

4 A No, I don't.

5 Q When you came and secured the one sign that you have  
6 told us about, did you make an inspection of the other signs to  
7 make sure they were okay?

8 A No, I did not.

9 Q Is there a reason you didn't do that?

10 A Not really, no.

11 Q Were there any unusual conditions that night such as  
12 a wind storm that you think may have caused this particular  
13 sign to come loose?

14 A Not that I can remember.

15 Q Now, referring your attention to Exhibit 55, do you  
16 have that in front of you?

17 A Yes, I do.

18 Q In the box said "ordered by P.O. number" the name  
19 Dave Whistler is typed there, do you see that?

20 A Yes, I do.

21 Q Do you know who that is?

22 A No, I don't.

23 Q He has testified before in deposition in this case  
24 and he was the manager of the Smith's Food King store. Does  
25 that mean that he called up and ordered this work to be done or

000375

1 screws and charge for them?

2 A Right. We are supposed to but if we use one or two  
3 colts it ain't worth the hassle up to know to make a material  
4 slip out for it.

5 Q You would have to make out separate slips?

6 A Uh-huh, stuff like that, so --

7 Q Mr. Thompson, in front of you there is a sheet of  
8 paper, a work order, at the top Exhibit 55, do you recognize  
9 this work order?

10 A No. I don't remember. Like I say, I did it, I  
11 guess my name is on it, mine and Jim's. Neither one of us can  
12 remember doing it.

13 Q Do you recognize any of your handwriting on this?

14 A Right there and there (indicating).

15 Q Let's see if you can say the words that are in your  
16 handwriting.

17 A "Readjusted time clock. Resecured the building  
18 sign."

19 Q And the readjusted time clock is in your  
20 handwriting?

21 A I'm sure it is, yes.

22 Q And the words at the bottom of the page, can you  
23 tell what they are?

24 A That ain't my handwriting there.

25 Q Readjusted time clock is not your handwriting?

000376

1 A No. That looks like mine.

2 MR. HENDERSON: Resecured building sign is yours?

3 THE WITNESS: Yes.

4 BY MS. WALTON:

5 Q Are the words pickup truck in your handwriting?

6 A Yes.

7 Q Near the printed words YESCO rep can you make out  
8 anything there and tell whether or not it's your handwriting?

9 A Looks like mine and Jim's handwriting there.

10 Q Is that your handwriting?

11 A Yes. I am sure that it is.

12 Q I would like you to look at Exhibit No. 57. Do you  
13 recall ever seeing Exhibit No. 57 before?

14 A No.

15 Q Do you recognize your handwriting on Exhibit 57?

16 A Yeah. I don't remember doing that though.

17 Q I will give you a moment to look at it.

18 A I don't remember that.

19 Q Could you tell me what is in your handwriting on  
20 Exhibit 57?

21 A My name here and then right there (indicating).

22 Q Resecured building sign, what appears to be an  
23 abbreviation for building?

24 A Un-nuh.

25 Q When you go out on a service call do you leave a

1 A 1940 South Main, Clearfield, Utah 84015.

2 Q Mr. Malm, my name is Phyllis Walton. I represent  
3 the plaintiffs in this action. Are you acquainted with the  
4 subject matter of this suit?

5 A I believe so, yes.

6 Q What's your understanding about it?

7 A It's a matter of what the cause was or reasoning was  
8 or something on that sign that fell down, the Smith's sign.

9 Q Do you know where that Smith's sign was?

10 A I do not know an address, no.

11 Q Have you ever been to the Smith's store on 94th  
12 South and about 20th East in Sandy?

13 A Yes, I have.

14 Q Have you been there more than once?

15 A Not to my knowledge.

16 Q Could you tell us about the one time you have been  
17 there?

18 A I cannot. I don't remember the time. I know I was  
19 there because my name was on a form that a work order that I  
20 had been there but I don't remember being there.

21 Q How long have you worked for YESCO?

22 A Five and a half years.

23 Q What is your current position?

24 A Foreman.

25 Q Foreman of any particular area?

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# YOUNG ELECTRIC SIGN COMPANY

YESCO

DATE July 1, 1982 CUST. PHONE 942-2334

IK AT: Smith's Food King

BILL TO: Smith's Management #16221

S: 2031 East 9400 South

ADDRESS 1550 South Redwood Road

TATE Sandy, Utah ZIP

CITY & STATE Salt Lake City, Utah ZIP 84104

ED BY P.O. NO.	CUSTOMER NUMBER	NEW CUSTOMER	TERRITORY	SALESMAN NUMBER	TYPE
Whistler		PREV. CUSTOMER	11	15	2-1
COMP. DATE	ACTUAL COMP. DATE		ORDER PREPARED BY	CREDIT APPROVAL	YESCO AUTHORIZATION
	7-2-82		St.		
LABOR	MATERIAL	PRIME COST OVERHEAD	TOTAL PRIME COST		

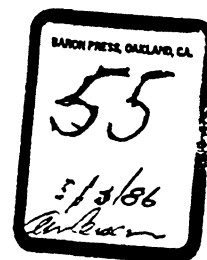
NATION OF WORK TO BE PERFORMED AND GOODS SOLD:

Time clock is not turning off  
CONTACT CUSTOMER BEFORE DOING ANY WORK as he wants to know how to set clock.

Re-secure building signs.

INVOICE AS FOLLOWS:

Pickup Truck



T & I:

Completed

YES: Ken Williams

FOR OFFICIAL USE ONLY

DATE

7/1/82

73 1 7/2/82

MATERIAL TRANSFER NO

Re-secured Bld Sign

Re-secured time clock

## ACCEPTANCE

THIS IS TO CERTIFY that our SIGN has been Installed ☐ Painted ☐ Serviced ☐ in accordance with our request. We hereby accept the sign and/or other work as indicated above as completed in a satisfactory and workmanlike manner.

# DATE 7-2-82

NAME Ken Williams

BY Ken Williams 000375



# YOUNG ELECTRIC SIGN COMPANY

DATE July 1, 1982 <sup>16221</sup> CUST. PHONE 942-2332

WORK AT: Smith's Food King

BILL TO: Smith's Management

DRESS 2039 East 9400 South

ADDRESS 1550 South Redwood Road

Y & STATE Sandy, Utah ZIP

CITY & STATE Salt Lake City, Utah ZIP 84104

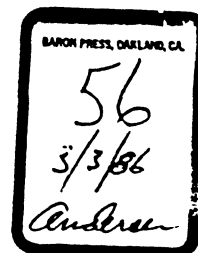
ORDERED BY P.O. NO.	CUSTOMER NUMBER	NEW CUSTOMER	TERRITORY	SALESMAN NUMBER	TYPE
ave Whistler	80000	PREV. CUSTOMER	11	15	2-1
EST. COMP. DATE	ACTUAL COMP. DATE	EST. CASH SALE PRICE	ORDER PREPARED BY	CREDIT APPROVAL	YESCO AUTHORIZATION
	7-2-82		Sm	P. Flores	
LABOR	MATERIAL	PRIME COST OVERHEAD	TOTAL PRIME COST		
		7-1-82			

PLANATION OF WORK TO BE PERFORMED AND GOODS SOLD:

Time clock is not turning off  
CONTACT CUSTOMER BEFORE DOING ANY WORK as he wants to know how to set clock.

Re-secure building sign.

INVOICE AS FOLLOWS:



T & M

CASH SALE PRICE .....	\$	INVOICE PAYABLE:  DOWN PAYMENT \$  BALANCE DUE UPON COMPLETION \$
PERMITS .....		
% SALES TAX .....		
TOTAL .....	\$	

THIS ORDER IS SUBJECT TO TERMS AND CONDITIONS ON REVERSE SIDE.

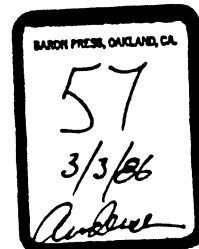
The undersigned Buyer hereby orders the goods and services described above and Young Electric Sign Company agrees to furnish, perform and sell the same for the shown above and on the terms and conditions which are set forth on the reverse side hereof and incorporated herein by reference

SALESMAN \_\_\_\_\_

BUYER \_\_\_\_\_ DATE \_\_\_\_\_

ACCEPTED FOR YOUNG ELECTRIC SIGN CO. BY \_\_\_\_\_

BY: [Signature] (IND) \_\_\_\_\_ (CORP.) \_\_\_\_\_  
TITLE \_\_\_\_\_  
PERFORMANCE BY BUYER IS PERSONALLY GUARANTEED BY THE UNDERSIGNED



## STORE WORK ORDER



SMITH'S MANAGEMENT CORP.

5520 So. Van Winkle  
Salt Lake City, Utah 84117

All labor and materials furnished on this work authorization will not exceed \$300. To exceed this limit specific authorization must be obtained from the Facility Engineering Department.

Authorization to exceed limit approved by .....

No 3250

SHOW ABOVE  
NUMBER ON INVOICE

VENDOR Vance Sign Co NUMBER OF MEN 2 DATE 7-2-82 TIME .....

COMPLAINA .....

SUMMARY OF REPAIRS MADE & PARTS USED .....

VENDOR'S TIME

Rescued Bld. Sign

OUT

IN

STORE EVALUATION OF SERVICE: .....

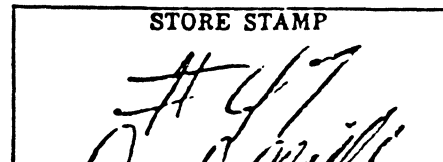
SERVICEMAN'S COMMENTS:

.....  
.....  
.....  
.....

VENDORS  
ATTACH THIS  
COPY TO  
INVOICE

1

STORE STAMP

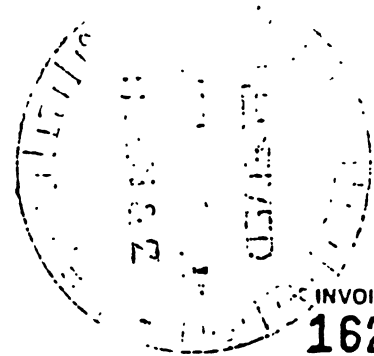


WORK ACCEPTED BY

Frank Thompson  
SERVICEMAN'S SIGNATURE





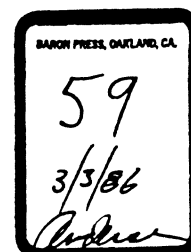


INVOICE NO.  
**16221**

All overdue payments shall bear interest at the rate of 1½% per month or the maximum rate allowed by state law.

**SCO**

**SMITH'S MANAGEMENT**  
1550 South Redwood Road  
Salt Lake City, Utah 84104



DATE 7-15-82 W/O DATE 7-1-82 W/O NO 93988 CUSTOMER NO 80000 CUSTOMER PO NO OR ORDERED BY Dave Whistler

TERRITORY 11 SALESMAN 15 COO 2-1

DESCRIPTION

PRICE AMOUNT

FOR WORK AT: **SMITH'S FOOD KING**  
2039 East 9400 South  
Sandy, Utah

Labor to secure sign and check time clock

48.00

R/sy] ]

Total

\$48.00

DUPLICATE INVOICE

PLEASE MAKE PAYMENT FROM THIS INVOICE  
TERMS: NET CASH DUE ON RECEIPT OF INVOICE.

  
TOTAL DUE

1 Q Well, I'm looking at a service order that's dated  
2 January 5, 1984. Apparently the work was done on January 9,  
3 1984 by you and Terry Sexton. I'm wondering what your job was  
4 with YESCO at that time.

5 A Okay. I was Terry Sexton's helper on the truck.

6 Q What was Terry -- is it Saxton or Sexton?

7 A Sexton.

8 Q What was his job at that time?

9 A He was the lead man on the truck. And at that  
10 particular time he was assigned to be responsible for the job.

11 Q Have you since then been promoted so you are more or  
12 less the lead person?

13 A Right. Since then I have been promoted. I am the  
14 lead man on a truck now at the present time.

15 Q What does Terry do now?

16 A Terry at this particular time is working inside the  
17 shop at this particular time.

18 Q Let me show you Exhibit 36 which is two pages. I'm  
19 showing you where it's opened to the first page. Please look  
20 at that page and also the next page which consists of two time  
21 cards. Take as much time as you want to. Have you seen these  
22 before?

23 MR. MOHRMAN: Look at the time card first before you  
24 answer. This one here.

25 THE WITNESS: Yes.

000384

1 BY MR. BULLOCK:

2 Q You have seen them before?

3 A Yes.

4 Q Did you look at them in preparation for your  
5 deposition?

6 A No.

7 Q When do you remember seeing these things before?

8 A I recognize them. They're a regular service order  
9 and daily service order that we do work, you know, every day we  
10 see them every day. Time cards are seen every day.

11 Q Do you remember an occasion in January of 1984 when  
12 you and Terry Sexton went to the Smith's Food King store at  
13 9400 South and about 20th East?

14 A I don't recall this particular date being, you know,  
15 being there, but in looking at this, you know, it appears that  
16 we were there but I don't recall.

17 Q So the documents would indicate it. You have no  
18 reason to quarrel with the documents?

19 A No.

20 Q But as far as in your own mind having a memory of  
21 what happened do you have a memory of visiting that store and  
22 doing any work?

23 A I don't remember.

24 Q In case it may help you remember, we have got some  
25 pictures which show the store front and the sign. I'm showing

1 you Exhibit 35, photograph one, so where the arrow is is the  
2 sign that we are talking about. The sign is not there any more  
3 in the picture, is it?

4 MR. HENDERSON: Or anywhere else, I might add.

5 MR. BULLOCK: You might.

6 BY MR. BULLOCK:

7 Q Does that help you remember ever working on that  
8 sign?

9 A Possibly, yes. And that particular day I don't  
10 recall, you know, particularly working on that, you know.  
11 There is many signs, the Smith's sign, and I don't remember,  
12 you know, particularly working on any particular sign or what I  
13 did on a particular day.

14 Q So the pictures really don't help?

15 A No.

16 Q Would you turn back to thirty-six. The handwriting  
17 which says "repair wiring, check out all signs," whose  
18 handwriting is that?

19 A Terry Sexton.

20 Q Do you have an understanding about what was  
21 customarily meant in your work by check out a sign? What did  
22 it mean?

23 A No. Looking over it, repairing wiring and checking  
24 out all signs, that would mean to me that we inspect the wiring  
25 inside the sign and cleared, you know, some shorts and checked

EXAM BY BULLOCK

1 MR. HENDERSON: HAVE YOU GOT EXTRA COPIES OF  
2 THOSE EXHIBITS? LET'S GO OFF THE RECORD.

3 (WHEREUPON, A DISCUSSION WAS HAD OFF THE  
4 RECORD; AFTER WHICH, THE FOLLOWING PROCEEDINGS  
5 CONTINUED:)

6 MR. BULLOCK: BACK ON THE RECORD. DO YOU KNOW  
7 WHO THE INDIVIDUALS ARE WHO DO THE PATROL? I GUESS I SHOULD  
8 ASK YOU: IS IT BROKEN DOWN BY THE PART OF THE COUNTY OR  
9 THE PART OF THE CITY, IF YOU KNOW?

10 A NO, I DON'T KNOW.

11 Q YOU JUST KNOW THERE IS SOME PATROL.

12 A YES.

13 Q IF I WANTED TO FIND OUT MORE ABOUT THE PATROL,  
14 WHO WOULD I ASK?

15 A YOU WOULD PROBABLY ASK KEN ANDERSON. HE'S THE  
16 SUPERVISOR OVER THE SERVICE CREW.

17 Q IS THERE A SUPERVISOR OF THE INSTALLATION CREW?

18 A YES, RICH LEATHERMAN.

19 Q DO YOU KNOW HOW LONG KEN AND RICH HAVE EACH HAD  
20 THE JOBS THEY HAVE NOW?

21 A NO, I DON'T.

22 Q DID THEY HAVE THEM WHEN YOU CAME TO WORK?

23 A YES.

24 Q DO YOU REMEMBER AN OCCASION IN EARLY NOVEMBER OR  
25 IT LOOKS LIKE NOVEMBER 12TH OF 1984 WHEN YOU PARTICIPATED IN

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EXAM BY BULLOCK

1 SOME WORK ON A SIGN AT THE SMITH'S FOOD KING STORE AT 9400  
2 SOUTH IN SALT LAKE?

3 A YES.

4 Q DO YOU HAVE A RECOLLECTION OF THAT?

5 A YES.

6 Q WHAT HAPPENED?

7 A WELL, WE WENT TO THE LOCATION. WE NEEDED--THERE  
8 WAS SOME OUTAGE IN THE SIGN, SO I WENT UP AND TURNED THE  
9 TIME CLOCK ON AND TERRY WENT UP AND WORKED ON IT.

10 Q YOU AND TERRY WERE THE ONES WHO WORKED ON IT ON  
11 THAT OCCASION?

12 A YES.

13 Q ANYBODY ELSE?

14 A NO.

15 Q IS IT YOUR UNDERSTANDING THAT THIS SERVICE ORDER  
16 GOT GIVEN TO TERRY SEXTON?

17 A RIGHT.

18 Q THEN HE GRABBED YOU AND SAID, "LET'S GO," OR  
19 SOMETHING?

20 A YEAH.

21 Q WHERE IT'S WRITTEN--LET'S SAY THE TYPED PORTION  
22 THAT SAYS, "THE WEST END OF THE BUILDING SIGN IS OUT,"  
23 WOULD THAT HAVE BEEN TYPED IN BY THE SECRETARY?

24 A YES.

25 Q AND WHERE IT'S HANDWRITTEN, "COMPLETE," DO YOU KNOW

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EXAM BY BULLOCK

1 NEW LAMPS AND THEY DON'T WORK, THEN WE CHECK THE BALLASTS.

2 Q DO YOU KNOW WHAT THE NUMBERS UNDER, "INSTALLATION"--  
3 LET'S SEE, DOES IT SAY "INSTALL"? WHAT'S WRITTEN AFTER,  
4 "INSTALLED," IF YOU CAN READ IT?

5 A "INSTALL"--.

6 Q IF YOU KNOW. I DON'T WANT YOU TO GUESS. I  
7 THOUGHT MAYBE YOU MIGHT HAVE KNOWN.

8 A "INSTALL BALLAST;" THAT'S ALL I KNOW.

9 Q DO YOU KNOW WHAT THE NUMBERS BELOW THAT REFER TO?

10 A YES, THOSE ARE THE SIZE OF THE BALLASTS.

11 Q DOES IT INDICATE TWO BALLASTS?

12 A YES.

13 Q FURTHER OVER ON THE LEFT IT SAYS, "MATERIAL  
14 TRANSFER NUMBER." DO YOU KNOW WHAT THOSE NUMBERS MEAN?

15 A THAT'S THE MATERIAL SLIP ON THE THIRD PAGE.

16 Q I SEE.

17 A ON THE TOP.

18 Q SO IF IT HADN'T GOTTEN CHOPPED OFF, PROBABLY THE  
19 THIRD PAGE UP IN THE RIGHTHAND CORNER WOULD SAY, "113277?"

20 A RIGHT.

21 Q I GUESS EACH EMPLOYEE HAS AN EMPLOYEE NUMBER?

22 A YES.

23 Q YOURS IS 350?

24 A YES.

25 Q THE SECOND PAGE OF EXHIBIT 38, THEN, WOULD BE

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1 TIME CARDS FOR YOU AND TERRY; IS THAT RIGHT?

2 A YES.

3 Q WHAT IS AN OPERATION CODE, IS IT 15.1?

4 A YES, THAT'S A MAINTENANCE CONTRACT.

5 Q DO YOU KNOW WHAT DEPARTMENT AREA CODE 5 MEANS?

6 A THAT'S ELECTRICAL.

7 Q LET'S MOVE NOW TO EXHIBIT 35 WHICH CONSISTS OF  
8 SEVEN PAGES. I WON'T BE ASKING YOU ABOUT ALL OF THEM, I  
9 DON'T THINK, BUT YOU'RE FREE TO GLANCE AT ALL OF THEM AND  
10 BECOME FAMILIAR WITH THEM.

11 NOW, LOOKING AT THE FIRST PAGE OF EXHIBIT 35,  
12 THIS PHOTOGRAPH NO. 2 APPEARS TO BE THE LOCATION OVER THE  
13 DOOR OF THE SMITH'S FOOD KING WHERE THAT SIGN WAS WHEN YOU  
14 WORKED ON IT?

15 A YES.

16 Q YOU INDICATED ONE OF THE FIRST THINGS YOU DID  
17 WHEN YOU GOT THERE WAS TO TURN THE TIME CLOCK ON?

18 A RIGHT.

19 Q NOW I'M GUESSING THAT YOU WENT DURING THE DAYTIME,  
20 AND YOU WANTED TO SEE HOW THE THING LIT UP AT NIGHT, SO YOU  
21 TURNED THE TIME CLOCK ON TO NIGHT; IS THAT RIGHT?

22 A NOW I DIDN'T UNDERSTAND WHAT YOU MEAN.

23 Q WHY DID YOU TURN THE TIME CLOCK ON?

24 A DURING THE DAY IT WAS--I DON'T KNOW WHAT TIME IT  
25 WAS. IT WAS JUST DURING THE DAY SOMETIME.

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EXAM BY HENDERSON

1 Q YOU HAVE SEEN THE ORIGINAL ONE OF THESE FORMS?

2 A YES.

3 Q OKAY. SO WHEN THE SERVICE PEOPLE GET A SERVICE  
4 ORDER, IS THE BOTTOM PART OF THE SERVICE ORDER FILLED OUT  
5 OR NOT?

6 A AFTER IT'S DONE, AFTER WE'VE DONE THE WORK.

7 Q I SEE. THIS PART AT THE BOTTOM THEN IS A METHOD  
8 BY WHICH THE GUY WHO PREPARES THE SERVICE ORDER CAN KEEP  
9 A HANDLE ON WHETHER THE WORK'S ACTUALLY PERFORMED?

10 A RIGHT.

11 Q ALL RIGHT. AND THEN THE TIME CARDS ARE WHAT'S  
12 FILLED OUT BY THE GUYS WHO ACTUALLY DO THE WORK INDICATED  
13 ON THE SERVICE ORDERS?

14 A RIGHT.

15 Q NOW EXHIBIT NO. 36 DOES NOT HAVE A MATERIAL  
16 TRANSFER FORM, BUT EXHIBIT 38 DOES. IS THERE SOME REASON  
17 THAT EXHIBIT 36 DOESN'T HAVE A MATERIAL TRANSFER FORM?

18 A WHAT THEY DO--IF THEY DIDN'T USE ANY MATERIAL, ALL  
19 THEY DID WAS REPAIR THE WIRING.

20 Q I SEE. NOW WHO WOULD FILL OUT THE MATERIAL  
21 TRANSFER FORM IF ANY IS NEEDED AT THE JOB; THE PERSON WHO  
22 ACTUALLY PERFORMED THE WORK?

23 A YES.

24 Q THEN WHAT HAPPENS AFTER THE WORK IS ACTUALLY  
25 PERFORMED AND THE TIME CARD'S FILLED OUT AND THE MATERIAL

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1 TRANSFER CARD IS FILLED OUT, ALL THAT'S RETURNED BACK TO THE  
2 PERSON WHO FILLED OUT THE SERVICE ORDER?

3 A YES.

4 Q THEN THE SERVICE ORDER PERSON COMPLETES THE  
5 SERVICE ORDER DOWN AT THE BOTTOM?

6 A YES.

7 Q IS THAT THE WAY IT WORKS?

8 A THEY WRITE ALL THIS, AND HE WRITES HIS NAME AND  
9 TURNS IT IN.

10 Q YOU'RE REFERRING NOW TO THE BOTTOM OF DEPOSITION  
11 EXHIBIT NO. 36?

12 A YES.

13 Q NOW REFERRING YOU TO THE TOP PART OF THE FIRST PAGE  
14 OF DEPOSITION EXHIBIT 36, HAVE YOU EVER SEEN THAT WRITING  
15 BEFORE TODAY?

16 A NO.

17 Q THAT IS THE "SHIRLEY" THAT'S CHECKED?

18 A I HAVEN'T SEEN IT. THIS IS THE GUY THAT WORKED  
19 BEFORE, THIS IS SOMEONE ELSE'S WRITING.

20 Q I UNDERSTAND. SO YOU DON'T KNOW ANYTHING ABOUT  
21 WHAT THESE NUMBERS HERE ABOVE "1981" MEAN?

22 A NO.

23 Q LET ME SHOW YOU WHAT'S BEEN MARKED AS DEPOSITION  
24 EXHIBIT NO. 40. HAVE YOU EVER SEEN THIS BEFORE?

25 A NO.

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1 Q DO YOU KNOW WHAT IT IS?

2 A NO.

3 Q I'LL SHOW YOU WHAT'S BEEN MARKED AS DEPOSITION  
4 EXHIBIT NO. 41. HAVE YOU EVER SEEN THIS BEFORE?

5 A NO.

6 Q I'LL SHOW YOU WHAT'S BEEN MARKED AS DEPOSITION  
7 EXHIBIT NO. 42. HAVE YOU EVER SEEN IT BEFORE?

8 A NO.

9 Q DO YOU KNOW WHETHER DEPOSITION EXHIBIT NO. 42 GOES  
10 WITH WHAT IS DEPOSITION EXHIBIT NO. 41; THAT IS, THAT IT'S  
11 PART OF THE SAME DOCUMENT?

12 A NO.

13 Q YOU DON'T KNOW?

14 A NO.

15 Q WAS THERE A CONTRACT NUMBER BETWEEN YESCO AND  
16 SMITH'S FOOD KING PRIOR TO CONTRACT NO. 92038-15?

17 A NO, I DON'T KNOW. I DON'T KNOW.

18 Q WHEN DID YOU START TO WORK FOR YESCO?

19 A '83, JUNE OF '83.

20 Q AND IS IT TRUE THAT THE ONLY TIME YOU WERE EVER  
21 TO THE SMITH'S FOOD KING AT 94TH SOUTH WAS IN CONNECTION  
22 WITH THE WORK PERFORMED ON ABOUT NOVEMBER 12TH, 1984?

23 A YES.

24 Q HAVE YOU EVER BEEN TO THAT LOCATION--THAT IS, THE  
25 SMITH'S FOOD KING AT 9400 SOUTH--FOR ANY OTHER PURPOSE OTHER

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ED  
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& ASSOCIATES

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(801) 363-2000

EXAM BY BULLOCK

1 A JUST BRIEFLY, JUST FROM BEING ON THE CREW. I NEVER  
2 HAVE WORKED WITH HIM.

3 Q WERE YOU A HELPER ON ROTATION FROM THE TIME YOU  
4 BEGAN WITH YESCO UNTIL YOU BECAME A SERVICE JOURNEYMAN?

5 A NO.

6 Q WHAT DID YOU DO BEFORE YOU WERE A HELPER?

7 A I STARTED AS A FORKLIFT DRIVER FOR ABOUT NINE MONTHS.

8 Q AND THEN YOU WENT ON ROTATION?

9 A YES.

10 Q I'LL SHOW YOU EXHIBIT NO. 37. IT CONSISTS OF THREE  
11 PAGES. PLEASE TAKE A MINUTE OR TAKE WHATEVER TIME YOU NEED  
12 TO READ THE THREE PAGES AND THEN I'LL ASK YOU SOME QUESTIONS  
13 ABOUT IT. OKAY?

14 A YES.

15 Q NOW IS THE FIRST PAGE WHAT'S CALLED, "SERVICE ORDER"?

16 A YES.

17 Q HOW IS THAT SERVICE ORDER CREATED?

18 A THIS ONE WAS CREATED FROM A PATROL. IT SAYS RIGHT  
19 THERE, "CONTACTED BY PATROL."

20 Q AND IS IT TRUE THAT THERE'S A PROCEDURE AT YESCO  
21 FOR PATROLS TO BE MADE ON SOME SORT OF BASIS, AND IF THEY  
22 SEE A PROBLEM, THEY RADIO IT IN?

23 A A LIGHTING PROBLEM, YEAH, BECAUSE THEY DO IT DURING  
24 THE NIGHT.

25 Q AND THE SECOND PAGE OF THE EXHIBIT ARE TIME CARDS

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Edward R. Midgley, RPR

PROPRIETOR

EXAM BY BULLOCK

1 FOR YOU AND LEE BREEZE; IS THAT RIGHT?

2 A YES.

3 Q AND DO THEY SHOW THAT THE TWO OF YOU PERFORMED SOME  
4 WORK AT THE SMITH'S FOOD KING ON AUGUST 20, 1984?

5 A YES.

6 Q AND WHAT IS THE THIRD PAGE OF THE EXHIBIT?

7 A A LIST OF MATERIAL TRANSFER SLIP THAT'S THE MATERIAL  
8 WE USED ON THE JOB.

9 Q SO IF MATERIALS ARE USED, THEN YOU DO THE  
10 TRANSFER SLIP TO KIND OF KEEP TRACK OF WHAT'S BEEN DONE OR  
11 WHAT'S BEEN USED?

12 A THE STOCK THAT COMES OFF THE TRUCK.

13 Q DO YOU HAVE A RECOLLECTION OF DOING SOME WORK AT  
14 THE SMITH'S FOOD KING AT 9400 SOUTH AND ABOUT 23RD EAST IN  
15 SALT LAKE ON OR ABOUT AUGUST 20TH OF '84?

16 MR. MOHRMAN: YOU HAVE TO ANSWER AUDIBLY.

17 A NO, I CAN'T. I CAN'T REMEMBER ANYTHING ABOUT IT.  
18 I DON'T.

19 Q THAT'S UNDERSTANDABLE, I THINK. I'LL SHOW YOU  
20 EXHIBIT 35. I'LL REPRESENT TO YOU THAT PHOTOGRAPH NO. 1 HERE  
21 SHOWS THE FRONT OF THAT STORE MINUS A SIGN WHICH WAS LOCATED  
22 ABOUT WHERE THE YELLOW ARROW IS.

23 A YES.

24 Q PHOTOGRAPH NO. 2 SHOWS A MORE CLOSE-UP VIEW OF WHERE  
25 THE SIGN HAD BEEN LOCATED RIGHT ABOVE THE DOORS.

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1           THERE MIGHT HAVE BEEN SOME CONSTRUCTION GOING ON  
2   IN ABOUT THE SUMMER OF 1984, IF THAT HELPS YOUR MEMORY AT  
3   ALL. AFTER LOOKING AT THESE, DO YOU HAVE ANY RECOLLECTION OF  
4   DOING ANY WORK THERE?

8           A     NO.

6           Q     GOING BACK TO EXHIBIT 37, IS THERE ANY WRITING BY  
7   YOU ON THE FIRST PAGE?

8           A     YEAH.

9           Q     WHAT PART IS WRITTEN BY YOU?

10          A     EVERYTHING ON THERE THAT'S BEEN WROTE.

11          Q     IN HANDWRITING?

12          A     YES.

13          Q     YOU CAN RECOGNIZE YOUR OWN HANDWRITING?

14          A     YES.

15          Q     UNDER, "MATERIAL DESCRIPTION," IS THAT, "REPLACED"?

16          A     ON THIS PAGE HERE?

17          Q     YES.

18          A     UNDER THAT, "MATERIAL DESCRIPTION," IT'S THE NUMBER  
19   ON THE MATERIAL TRANSFER SLIP OFF OF THIS BACK PAGE.

20                   MR. MOHRMAN: HE'S ASKING WHAT THIS WORD RIGHT  
21   HERE SAYS.

22          A     OH, THAT'S, "REPLACED," YES.

23          Q     AND THERE'S THREE SEPARATE ENTRIES. WHAT DO THEY  
24   STAND FOR?

25          A     THE FIRST ONE IS A 72-INCH COOL WHITE LAMP. THE

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PROPRIETOR

000396

1 SECOND ONE IS A 64-INCH COOL WHITE LAMP. THE THIRD ONE IS  
2 A 42-INCH COOL WHITE LAMP.

3 Q UP ABOVE WHERE IT'S TYPED THERE IS A SECOND TYPE-IN  
4 UNDER, "EXPLANATION OF WORK TO BE PERFORMED." DO YOU HAVE  
5 AN UNDERSTANDING OF WHAT IT SAYS OR WHAT IT MEANS?

6 A YES.

7 Q WHAT IS THAT UNDERSTANDING?

8 A JUST THAT IT READS, "THE SMITHS CAN WEST END IS  
9 OUT ON THE S/F BUILDING SIGN," ON THE SINGLE FACE.

10 Q WHAT DOES "CAN" MEAN?

11 A IT'S A SHORTCUT FOR SAYING THE SIGN. WE CALL THEM  
12 A CAN, BECAUSE THEY'RE MADE OF STEEL. THEY CALL THEM A CAN.

13 ANY TIME A SIGN THAT'S BUILT LIKE THAT, ONE SINGLE  
14 FACE, IS CALLED A CAN. IT'S JUST AN EXPRESSION.

15 Q THIS WOULD TELL YOU THAT THE WEST SIDE OF THE SIGN  
16 WAS NOT LIGHTING?

17 A YES.

18 Q AND "S/F" MEANS "SINGLE FACE"?

19 A YES.

20 Q IF YOU WERE TO TAKE THIS DESCRIPTION AND GO OUT  
21 TO THE SMITH'S FOOD KING STORE, WOULD YOU EXPECT THIS  
22 DESCRIPTION TO PERTAIN TO THE SIGN WHOSE OUTLINE IS THERE BUT  
23 THE SIGN IS MISSING?

24 A IF THAT'S THE ONLY ONE THAT SAYS, "SMITH'S," I  
25 WOULD HAVE.

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1 Q IF A SIGN HAD BEEN PLACED UP AGAINST THE WALL AS IT  
2 APPEARS IN PHOTOGRAPH NO. 2 OF EXHIBIT NO. 35, IS THAT WHAT  
3 YOU WOULD CALL A SINGLE FACE BUILDING SIGN?

4 A YES.

5 Q AFTER LOOKING AT PAGES 1, 2, AND 3 OF EXHIBIT NO. 37,  
6 CAN YOU TELL ME WHAT THEY SHOW ABOUT WHAT WORK WAS DONE TO  
7 A SIGN ON THAT DATE?

8 A YES, IT SAYS THAT WE REPLACED FOUR LAMPS ON THE  
9 SINGLE FACE BUILDING SIGN THAT DAY.

10 Q DO YOU HAVE ANY REASON TO BELIEVE THAT THAT WAS NOT  
11 DONE?

12 A NO, I DON'T HAVE ANY REASON TO BELIEVE THAT.

13 Q YOU JUST, IF I UNDERSTAND IT RIGHT, DO SO MUCH OF  
14 THIS THAT YOU JUST DON'T HAVE A PARTICULAR MEMORY OF THIS  
15 PARTICULAR JOB; IS THAT RIGHT?

16 A THAT'S RIGHT.

17 Q BUT YOU DON'T QUARREL WITH THE RECORDS TO THE  
18 EXTENT THEY SAY THAT IT WAS DONE?

19 A YEAH, IT SAYS HERE THAT I DID IT.

20 Q WHAT DO YOU CALL THOSE FOUR--LIGHTBULBS, ARE THEY?

21 A THEY'RE LAMPS, YES.

22 Q FLUORESCENTS?

23 A YES.

24 Q THE LAST PAGE OF EXHIBIT 35 IS A MECHANICAL DRAWING  
25 OF THE SIGN WHICH FELL FROM THE SPOT WHERE IT HAD BEEN

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1 A IN--.

2 Q IN GENERAL.

3 A IN GENERAL?

4 Q THAT IS, HE ROTATES ALSO?

5 A YES.

6 Q HAVE YOU EVER DONE OTHER JOBS FOR YOUNG ASIDE FROM  
7 THE ONE THAT YOU HAVE JUST DESCRIBED?

8 A NO.

9 Q CAN YOU TELL ME FROM MEMORY DURING WHAT PERIODS OF  
10 TIME YOU WERE DOING THE VARIOUS WORK THAT YOU WOULD ROTATE TO?

11 A INSTALLATION WHEN I WAS ON THERE. I CAN'T REMEMBER  
12 QUITE THE DATE OF IT, BUT I WAS IN WENDOVER FOR ABOUT THREE  
13 MONTHS PUTTING THE SIGNS UP THERE.

14 SERVICE, I HAVEN'T SPENT TOO MUCH TIME THERE, BECAUSE  
15 I BROKE MY LEG AND WAS OFF FOR FOUR MONTHS DURING THAT, SO  
16 IT'S KIND OF HARD. I'VE BEEN KIND OF SCATTERED IN BETWEEN  
17 THEM ALL.

18 Q LET ME SHOW YOU EXHIBIT NO. 37 AND THEN I'LL ASK  
19 YOU SOME QUESTIONS ABOUT IT. WOULD YOU TAKE A MINUTE AND LOOK  
20 AT IT, IF YOU HAVE NOT ALREADY? IT CONSISTS OF THREE PAGES.  
21 I'D LIKE YOU TO LOOK AT EACH ONE OF THEM.

22 EXHIBIT 37 PERTAINS TO SOME WORK THAT WAS DONE  
23 ON AUGUST 20TH OF 1984; IS THAT RIGHT?

24 A YES, SIR.

25 Q AND THE WORK WAS DONE AT THE SMITH'S FOOD KING ON

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10395

EXAM BY BULLOCK

1 94TH SOUTH AND 32RD EAST IN SANDY; IS THAT CORRECT?

2 A YES, SIR.

3 Q AND I'LL SHOW YOU EXHIBIT NO. 35, AND PARTICULARLY  
4 THE FIRST PAGE OF IT. PHOTOGRAPH NO. 1 SHOWS A YELLOW ARROW  
5 WHERE THE SIGN WAS LOCATED, AND I'LL REPRESENT TO YOU THAT  
6 THAT WAS THE SIGN THAT THIS WORK INVOLVED.

7 AND PHOTOGRAPH NO. 2 SHOWS A CLOSER PICTURE OF  
8 WHERE THE SIGN WAS. DO YOU HAVE A RECOLLECTION OF PARTICI-  
9 PATING IN SOME WORK ON THAT SIGN?

10 A I SURE DON'T.

11 Q DO YOU HAVE ANY REASON TO QUARREL WITH THE  
12 ACCURACY OF THE RECORDS WHICH COMPRISE EXHIBIT 37?

13 A NO.

14 Q WHY IS IT YOU DON'T HAVE A MEMORY OF WORKING ON  
15 THIS SIGN?

16 A I WORK ON AN AWFUL LOT OF SIGNS DURING THE YEARS,  
17 AND I JUST DON'T HAVE ANY RECOLLECTION OF WORKING ON THIS  
18 SIGN.

19 I SEE THAT MY NAME IS DOWN ON HERE FOR DOING SOME  
20 SERVICE WORK, REPLACING SOME LIGHT BULBS, BUT OTHER THAN THAT  
21 I DON'T REMEMBER WORKING ON IT.

22 Q IN AUGUST OF 1984, WERE YOU IN THE ROTATION THAT  
23 YOU'VE TOLD US ABOUT? WERE YOU DOING OUTSIDE SERVICE WORK?

24 A YES, SIR.

25 Q AND WERE YOU WORKING WITH RANDY LAMBERT?

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Edward P. Midgley, RPR

11 PROPRIETOR

1           A     SERVICE, SIGN SERVICE.

2           Q     LET ME SHOW YOU EXHIBIT 35, WHICH IS A  
3     SERIES OF PICTURES OF THE SMITH'S FOOD KING STORE  
4     AT 94TH SOUTH AND 20TH EAST IN SANDY, UTAH.

5           A     YES.

6           Q     NOW, THIS LAWSUIT CONCERNS A SIGN THAT  
7     WAS LOCATED ABOVE THE DOOR AS IS SHOWN IN PHOTO NO. 1  
8     OF EXHIBIT 35, AND THAT SIGN FELL ON JANUARY 5, 1985,  
9     AND STRUCK A MAN AND INJURED HIM, AND HE DIED. YOU  
10    CAN SEE THE OUTLINE OF THE SIGN. IT HAD A CROWN AT  
11    THE TOP. ALSO SOME OF THE OTHER PICTURES SHOW THE  
12    SIGN, ALTHOUGH IT HAS SNOW ON IT, AND IT'S BEEN  
13    BROKEN.

14          A     YES.

15          Q     YESCO HAS PRODUCED SERVICE ORDERS FOR TWO  
16    OCCASIONS WHICH INDICATE SOME WORK BY YOU ON THAT  
17    SIGN?

18          A     YES.

19          Q     OR AT LEAST THAT'S SUGGESTED. I DON'T  
20    WANT TO INDICATE IT'S CONCLUSIVE. ONE WOULD HAVE  
21    BEEN IN JANUARY OF 1984 AS SHOWN ON EXHIBIT 36?

22          A     YES.

23          Q     AND THERE ARE TIME CARDS ATTACHED TO  
24    EXHIBIT 36?

25          A     RIGHT.

1 Q THE OTHER OCCASION WOULD HAVE BEEN IN  
2 NOVEMBER OF 1984 AS SHOWN ON EXHIBIT 38, RIGHT?

3 A YES. THAT WAS MATERIAL USED.

4 MR. BULLOCK: THE WITNESS IS REFERRING TO  
5 THE LAST PAGE OF EXHIBIT 38 WHERE IT SAYS "MATERIAL  
6 TRANSFER."

7 Q (BY MR. BULLOCK) MY QUESTION IS, DO YOU  
8 HAVE A RECOLLECTION OF GOING TO THE SMITH'S STORE  
9 AND PERFORMING WORK ON THOSE TWO OCCASIONS?

10 A I REMEMBER THIS ONE.

11 Q YOU ARE REFERRING TO THE LAST OCCASION IN  
12 NOVEMBER OF 1984?

13 A YES. I REMEMBER THAT ONE.

14 Q DO YOU HAVE A MEMORY OF GOING THERE AND  
15 PERFORMING WORK ON THE EARLIER OCCASION?

16 A I DON'T REALLY RECALL THAT ONE, NO.

17 Q DO YOU HAVE ANY REASON TO QUARREL WITH THE  
18 ACCURACY OF THE REPORTS, HOWEVER?

19 A NO. I COULD HAVE BEEN THERE. I JUST  
20 COULDN'T REALLY TELL YOU WHAT I WOULD HAVE DONE. IT  
21 LOOKS LIKE IT MUST HAVE HAD A SHORT IN IT OR  
22 SOMETHING.

23 Q I TAKE IT THAT YOU DO REPAIRS OF SO MANY  
24 SIGNS THAT SOMETIMES IT'S HARD TO REMEMBER  
25 INDIVIDUAL --

1           A     YES. I HAVE DONE A LOT OF REPAIR WORK,  
2     WIRING ON DIFFERENT SIGNS.

3           Q     WHAT DO YOU REMEMBER ABOUT THE INCIDENT  
4     REFLECTED BY EXHIBIT 38? LET ME POINT OUT TO YOU  
5     THAT THE SERVICE ORDER IS DATED OCTOBER 31, AND IT  
6     APPEARS THE WORK WAS DONE ON NOVEMBER 12. SO WITH  
7     THAT PREFACE, THE QUESTION IS, WHAT DO YOU RECALL  
8     ABOUT WHAT YOU DID?

9           A     I INSTALLED TWO BALLASTS.

10          Q     WHO WORKED WITH YOU?

11          A     ERIC JACOBS.

12          Q     HOW WAS IT THAT YOU WERE ALERTED TO GO TO  
13     THE STORE AND DO THAT WORK?

14          A     WELL, EACH MORNING THEY LINE US UP WITH  
15     WHAT WORK NEEDS TO BE DONE, AND THIS IS ONE OF THE  
16     WORK ORDERS THEY GAVE ME TO DO. SO WE JUST DO IT.

17          Q     DO YOU KNOW HOW IT WAS THAT A PROBLEM HAD  
18     BEEN IDENTIFIED PRIOR TO GIVING YOU THE WORK ORDER?

19          A     YES. WE HAVE A NIGHT PATROL, AND IT WAS  
20     PICKED UP BY NIGHT PATROL THAT THERE WAS OUTAGE IN  
21     THE SIGN.

22          Q     THAT IS, SOMETHING THAT SHOULD HAVE BEEN  
23     LIT UP WASN'T LIT UP?

24          A     RIGHT.

25          Q     YOU WERE SENT OUT TO FIND OUT WHY AND FIX



# SERVICE ORDER

SCD YOUNG ELECTRIC SIGN COMPANY

CONTRACT NUMBER

DATE Jan 5, 1984

92038-15

WORK AT Smith's Food King

ORDERED  
PREPARED BY Sm

RESS 9400 South 20th East

SPECIAL  
MAINTENANCE

STATE Sandy, Utah

CONTACT DB

LOCATION OF WORK TO BE PERFORMED

The Pharmacy sign is out

The SMITHS sign on the building has outage.

*Shirley checked  
back through  
beginning 1981  
these 3 all on file  
last yr.*

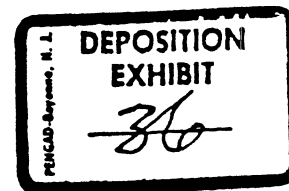
*Complete*

MATERIAL TRANSFER NO

MATERIAL DESCRIPTION


*Repair wiring check out  
all signs*

OVER NO	TIME	DATE
52	2.0	1-9-84
53	2.0	1-9-84



DATE

APPROVAL

*[Signature]*



YBSCO YOUNG ELECTRIC SIGN COMPANY

## TIME CARD

REMARKS

MORN	IN	8:33	11:44
	OUT		
NOON	IN		
	OUT		
EVE.	OUT		
O.T.	IN		
	OUT		

SIGNATURE

APPROVAL

JOB NAME

WORK ORDER  
NUMBEROPER-  
ATION  
CODEDEPT.  
AREA  
CODES

HOURS

REGULAR

OVERTIME

Class  
Code

AMOUNT

Smiths Food King

92038

15-1 5

2:0

\$

American Savings

02079

15-1 5

2:0

Circle K Foods

96310

11-1 5

2:0

Truck Maintenance #29

28-1

2:0

702/50M/B-83

TOTALS

8:0

\$

EMPLOYEE NO. 650

NAME TERRY S. YOUNG

DATE 1-9-84



YBSCO YOUNG ELECTRIC SIGN COMPANY

## TIME CARD

REMARKS

MORN	IN	9 JAN 7 06
	OUT	
NOON	IN	
	OUT	
EVE.	OUT	
O.T.	IN	
	OUT	

SIGNATURE

APPROVAL

JOB NAME

WORK ORDER  
NUMBEROPER-  
ATION  
CODEDEPT.  
AREA  
CODES

HOURS

REGULAR

OVERTIME

Class  
Code

AMOUNT

Smith food King

92038

15-1 5

2:0

\$

American Savings

02079

15-1 5

2:0

Circle K Foods

96310

11-1 5

2:0

~~Smith Food King~~

Truck #29

15-1 5

2:0

00405

 YESCO YOUNG ELECTRIC SIGN COMPANY

DATE Oct. 31, 1984 92038-15

FOR WORK AT Smiths Food King

ORDERED  
PREPARED BY Sm

ADDRESS 9400 South 2300 East

SPECIAL  
MAINTENANCE

CITY & STATE Sandy, Utah

CONTACT patrol

EXPLANATION OF WORK TO BE PERFORMED

The West end of the building sign is out

Complete

MATERIAL TRANSFER NO			
1	1	3	2
7	7		

MATERIAL DESCRIPTION		
<u>Install of Ballast</u>		
<u>1- 861</u>		
<u>1- 741C</u>		

EMPLOYEE NO	TIME	DATE
<u>4252</u>		<u>11/1</u>
<u>350</u>		<u>11/2</u>

DEPOSITION  
EXHIBIT  
38

PENGAD-Bayonne, N. J.

DATE 11/12-84 APPROVAL Tony Syton



EMPLOYEE NO. 350 NAME ERIC JACOBS DATE 11-12-84



# TIME CARD

YESCO, YOUNG ELECTRIC SIGN COMPANY.

SIGNATURE *Eric Jacobs*

REMARKS

APPROVAL *[Signature]*

MORN	IN	
	OUT	
NOON	IN	
	OUT	
EVE.	OUT	
O.T.	IN	
	OUT	

JOB NAME	WORK ORDER NUMBER	OPERATION CODE	DEPT AREA CODES	HOURS		Class Code	AMOUNT
				REGULAR	OVERTIME		
Kearney Shoes	97849	11	5	1.0			\$
Smiths Food King	92038	15	5	1.0			
Brighton Bank	00190	15	5	1.0			
Valley Bank	01493	15	5	1.0			
Trolley Theater	86978	15	5	2.0			
Crawford & Day	22528	13	5	1.0			
Mr Brake	91152	13	5	1.0			
				TOTALS	8.0		\$

702/75M/9-84

EMPLOYEE NO. 350 NAME ERIC JACOBS DATE 11-17-84



# TIME CARD

YESCO, YOUNG ELECTRIC SIGN COMPANY.

SIGNATURE *Eric Jacobs*

REMARKS

APPROVAL *[Signature]*

MORN	IN	
	OUT	
NOON	IN	
	OUT	
EVE.	OUT	
O.T.	IN	
	OUT	

JOB NAME	WORK ORDER NUMBER	OPERATION CODE	DEPT AREA CODES	HOURS		Class Code	AMOUNT
				REGULAR	OVERTIME		
KIMMEY SHOES	97849	11	5	1.0			\$
SMITH'S FOOD KING	97038	15	5	1.0			
BRIGHTON BANK	00190	15	5	1.0			
VALLEY BANK & TRUST	01493	15	5	1.0			
TROLLEY THEATER	26978	15	5	2.0			
CRAWFORD AND DAY	22528	13	5	1.0			
MR. BRAKE	91152	13	5	1.0			

2	2	0	3	8
---	---	---	---	---

USE ONLY ONE W O  
NO OR CONTRACT NO  
ON THIS SUB



# TRANSFER

DIVISION NO. 56

BRANCH NO. 52

DATE 11-13-84

JOB NAME Smith food king

DATE 11-13-84

[illegible]

**FORM 703 50M 12/82**

BY James J. Hoffman James J. Hoffman TOTAL ☐

NOV 15 1984

TELETYPED

000408

EXHIBIT "C"

LAW OFFICES

**SNOW, CHRISTENSEN & MARTINEAU**

10 EXCHANGE PLACE, ELEVENTH FLOOR

POST OFFICE BOX 3000

SALT LAKE CITY, UTAH 84110

TELEPHONE (801) 521-9000

TELECOPIER (801) 363-0400

THURMAN & SUTHERLAND	1886
THURMAN SUTHERLAND & KING	1888
THURMAN WEDGWOOD & IRVINE	1906
IRVINE SKEEN & THURMAN	1923
SKEEN THURMAN WORSLEY & SNOW	1952
WORSLEY SNOW & CHRISTENSEN	1967

JOHN H. SNOW 1917-1980

OF COUNSEL  
JOSEPH NOVAK  
GEORGE N. LARSEN

WRITER'S DIRECT NUMBER

HAROLD G. CHRISTENSEN	STEPHEN ROTH
REED L. MARTINEAU	DENNIS C. FERGUSON
STUART L. POELMAN	DAMIAN C. SMITH
RAYMOND M. BERRY	STEPHEN J. MILL
M. JAMES CLEGG	BRUCE H. JENSEN
MERLIN R. LYBBERT	HENRY K. CHAI II
DAVID W. SLAGLE	BRYCE D. PANZER
A. DENNIS NORTON	JODY K. BURNETT
ALLAN L. LARSON	STANLEY K. STOLL
JOHN E. GATES	DAVID J. CASTLETON
R. BRENT STEPHENS	PAMELA G. HEFFERNAN
KIM R. WILSON	DAVID W. SLAUGHTER
MICHAEL R. CARLSTON	STANLEY J. PRESTON
GEORGE A. HUNT	JOY L. SANDERS
ELLIOTT J. WILLIAMS	R. SCOTT HOWELL
DAVID G. WILLIAMS	RODNEY R. PARKER
REX E. MADSEN	SHAWN E. DRANEY
DEE V. BENSON	ROBERT L. BOLICK
MAX D. WHEELER	JERRY D. FENN
PAUL J. GRAF	JOHN R. LUND
PAUL C. DROZ	BRUCE R. GARNER
MICHAEL D. BLACKBURN	CHRISTOPHER C. FULLER
ROBERT H. HENDERSON	

August 26, 1985

Mr. Gary D. Stott  
Richards, Brandt, Miller &  
Nelson  
50 South Main, 7th Floor  
Salt Lake City, Utah 84110

Re: Toshiko Pickhover, et al. v. Smith's Management  
Corporation, et al., Civil No. C85-4307.

Dear Mr. Stott:

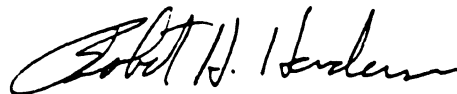
On August 28, 1981, Marveon Sign Company and Young  
Electric Sign Company entered into a Purchase Agreement,  
a copy of which is enclosed.

By Section 2.a of that Purchase Agreement, Young  
Electric Sign Company agreed to "to provide...insurance  
coverage adequate to fully protect (Marveon Sign Company)  
against...personal injury or death claims arising out of  
the ownership, maintenance, use, service, transportation,  
or installation of Displays in a minimum amount of \$1,000,000."

Marveon Sign Company hereby tenders the defense of  
Marveon Sign Company in Civil No. C85-4307 to Young Electric  
Sign Company and Young Electric Sign Company's insurers.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

  
Robert H. Henderson

RHH/yc  
Encl.

cc: Jerry Brown  
Kalvin Miller

000-109

EXHIBIT "D"

**RICHARDS, BRANDT, MILLER & NELSON**

A PROFESSIONAL LAW CORPORATION  
CSB TOWER - 50 SOUTH MAIN - SUITE 700  
PO BOX 2465  
SALT LAKE CITY UTAH 84110

WILLIAM S RICHARDS PC JOHN L YOUNG  
ROBERT W BRANDT DAVID K LAURITZEN  
P KEITH NELSON LYNN S DAVIES  
M KENT CHRISTOPHERSON ROBERT G GILCHRIST  
GARY D STOTT MICHAEL E DYER  
GARY B FERGUSON RUSSELL C FERICKS  
ROBERT L STEVENS MICHAEL K MOHRMAN  
NELSON L HAYES MICHAEL P ZACCHEO  
DAVID L BARCLAY GARY L JOHNSON

ROBERT W MILLER  
(1940-1983)

TELEPHONE  
(801) 531-1777

September 13, 1985

Robert H. Henderson, Esq.  
Snow, Christensen & Martineau  
10 Exchange Place, 11th Floor  
Post Office Box 3000  
Salt Lake City, Utah 84110

Re: Pickhover vs. Smith's Management  
& Young Electric  
Our File No.: 26049-136

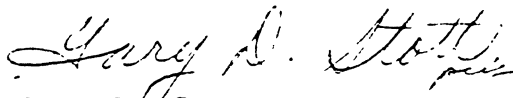
Dear Mr. Henderson:

I have discussed your tender of defense request with my clients. It is our opinion based upon the contract between Marveon Sign and Young Electric Sign that the acceptance of defense must be denied.

If you believe this contract provides otherwise, I would be happy to discuss it with you.

Sincerely,

RICHARDS, BRANDT, MILLER & NELSON

  
Gary D. Stott

GDS:pck

00041C

Tab C

For the purposes of this Motion, Young Electric Sign Company (hereinafter "YESCO") takes no issue with Marveon's Statement of Undisputed Facts, with the exception of the following additions:

1. At paragraph 3, Marveon states that the Purchase Agreement between Marveon and YESCO provides that YESCO would "provide, at its expense, insurance coverage adequate to fully protect [Marveon] against . . . personal injury or death claims arising out of the ownership, maintenance, use, service, transportation or installation of displays in a minimum amount of One Million Dollars (\$1,000,000)." YESCO would add that the Purchase Agreement also states "Buyer assumes no liabilities or obligations of Seller except as specifically described and set forth herein." (Purchase Agreement, Section 2.b. at p. 3.)

2. The Purchase Agreement also states that: "From the date hereof to and including the Closing Date, the Seller will not enter into any such contract or contracts without the prior written consent of Buyer. The Seller [Marveon] has performed in all material respects all obligations required to be performed by it to the date hereof and is not in default in any material respect under any agreements, leases, or other documents to which it is party and to which Buyer is succeeding or assuming obligations hereunder." (Purchase Agreement, Section [No. 20]c. at p. 13.)

3. Between August 1981, and January, 1985, YESCO was not the only company to perform

maintenance on the sign. During that period, maintenance was also performed by the defendant Image National, Inc.

#### ARGUMENT

Marveon has argued two separate points in its Motion for Summary Judgment. First, Marveon argues that "YESCO agreed to fully protect Marveon against personal injury or death claims . . ." and is thus entitled to summary judgment. Second, Marveon requests attorneys' fees. Neither of Marveon's arguments are supported by the facts or the law. Both points, for example, are totally devoid of citation to either statutory or judicial authority. After careful reading of the Purchase Agreement, it is difficult to see how Marveon can expect full protection from personal injury or death claims when no mention is made in the Purchase Agreement of YESCO agreeing to assume liability for Marveon's past negligence. This is especially true in light of Marveon's warranty to YESCO in the Purchase Agreement that any contracts entered into before the closing date were not in default in any material respect. Further, Utah case law mandates that Marveon's motion for summary judgment be denied.



POINT I

A FACTUAL QUESTION EXISTS WHETHER YESCO AGREED TO FULLY PROTECT MARVEON AGAINST PERSONAL INJURY OR DEATH CLAIMS IN A MINIMUM AMOUNT OF ONE MILLION DOLLARS FOR THE NEGLIGENCE OF MARVEON PRIOR TO THE DATE OF THE PURCHASE AGREEMENT.

Marveon argues that Section 2.a. of the Purchase Agreement is unambiguous in requiring YESCO to provide insurance coverage adequate to fully protect Marveon against personal injury or death claims arising out of the ownership, maintenance, use, service, or installation of signs up to the minimum amount of One Million Dollars. YESCO maintains that this language is anything but unambiguous and that it was Marveon's negligence that brought about this litigation. The Utah Supreme Court has applied a strict interpretation standard when interpreting indemnity provisions similar to this. The court's standard in interpreting indemnity provisions purporting to indemnify the indemnitee for its own negligence is set forth in Union Pacific Railroad Co. v. El Paso Natural Gas Co., 408 P.2d 910, 914 (1965) as follows:

The majority rule appears to be that in most situations, where such is the desire of the parties, and it is clearly understood and expressed, such a covenant will be upheld. But the presumption is against any such intention, and it is not achieved by inference or implication from general language such as employed here. It will be regarded as a binding contractual obligation only when that intention is clearly and unequivocally expressed.

Clearly, the general language used in this indemnity provision

would not rebut the presumption against any intention by YESCO to indemnify Marveon for its own negligence.

YESCO maintains that in entering into the Purchase Agreement with Marveon, it never intended to assume any liability for Marveon's past negligent acts. As support for this contention, YESCO invites the court's attention to Section [20] of the Purchase Agreement entitled "Representations, Warranties and Covenants of the Seller, on p. 12 and 13. Particularly, subparagraph c states in pertinent part as follows:

The Seller has performed in all material respects all obligations required to be performed by it to the date hereof and is not in default in any material respect under any agreements, leases, or other documents to which it is a party and to which Buyer is succeeding or assuming obligations hereunder.

This language clearly indicates that YESCO was relying on Marveon's representation that past contracts had been performed in all material respects and that Marveon was not in default in any material respect under any of those contracts. Had Marveon not made such guarantees, YESCO would have never agreed to provide insurance coverage adequate to fully protect Marveon against property damage or personal injury or death claims arising out of the ownership, maintenance, use, service, transportation or installation of displays in a minimum amount of One Million Dollars. YESCO asserts and intends to show at the trial that Marveon's negligence in putting up the sign was the cause of the accident that is the subject of this litigation. That negligence

resulted in a breach of contract on Marveon's part with Smith's and consequently with YESCO. Because of that breach of contract, the language in the Purchase Agreement representing the indemnity provision no longer applies.

Assuming, arguendo, that the contract was not breached, the language of the indemnity provision is not specific enough to impose upon YESCO liability for the negligent acts of Marveon. This contention finds continued support from the language of the Utah Supreme Court in Union Pacific Railroad Co. v. El Paso Natural Gas Co., 408 P.2d 910 (1965):

If it had been the intent of the parties that the defendant should indemnify the plaintiff even after the latter's negligent acts, it would have been easy enough to use that very language and to thus make that intent clear and unmistakable, which was not done here.

Id. at 914. The Utah Supreme Court has held language much more specific than the case at bar does not constitute clear and unequivocal expression of the intentions of the indemnitor to indemnify the indemnitee for the indemnitee's negligent acts. In Howe Rents Corp. v. Worthen, 420 P.2d 848, 849 (1966) the language "shall be liable for all damage or loss of equipment regardless of cause" was held not clear enough to support indemnification when the indemnitee was negligent.

YESCO never intended to assume liability for Marveon's past negligent acts. Had YESCO intended to assume such liability, it would not have required from Marveon a warranty that Marveon was not in default in any

material respect under its past contracts. YESCO would have also had their assumption of liability clearly spelled out in the indemnity provision. Such was clearly not the intention of YESCO, and Marveon should not now be allowed to profit from its own negligent acts. There is a presumption against allowing Marveon to insure itself against its own negligent acts. Freund v. Utah Power & Light, 625 F. Supp. 272, 280 (D. Utah 1985). The presumption in this case cannot be overcome.

#### POINT II

MARVEON SHOULD NOT BE ALLOWED COSTS AND  
ATTORNEY'S FEES IN ITS MOTION FOR SUMMARY  
JUDGMENT.

YESCO argues that because it is not required to fully protect Marveon against personal injury or death claims when Marveon's own negligence is the cause of those claims, YESCO should not be required to pay Marveon's costs and attorney's fees in a claim of this kind against YESCO. YESCO is under no duty to indemnify Marveon for its negligence. Such a lack of a duty would also apply to any request for indemnification for costs and attorney's fees in this cause of action.

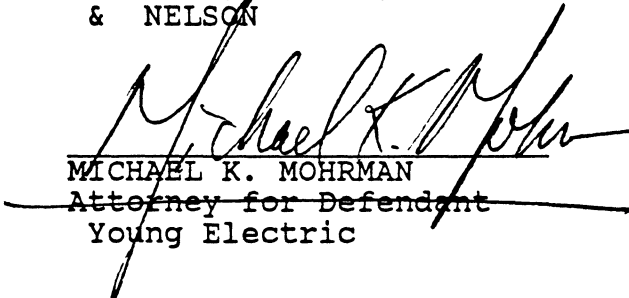
#### CONCLUSION

There are many disputed factual matters in Marveon's Motion to this Court for Summary Judgment. In addition, both points in Marveon's Memorandum in Support of Its Motion for Summary Judgment are clearly not supported by

the law of this jurisdiction. The language in the indemnity provision is ambiguous and a significant question of fact exists as to which party's negligence is the cause of this litigation. The language of the Purchase Agreement supports YESCO's contention that it did not agree to indemnify Marveon for Marveon's negligent acts. For these reasons, and based on the arguments developed above, YESCO respectfully requests this Court to deny Marveon's Motion for Summary Judgment on all issues presented.

RESPECTFULLY submitted, this 22 day of October, 1986.

RICHARDS, BRANDT, MILLER  
& NELSON

  
MICHAEL K. MOHRMAN  
Attorney for Defendant  
Young Electric

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed first class, postage prepaid on this 22 day of October, 1986, to the following counsel of record:

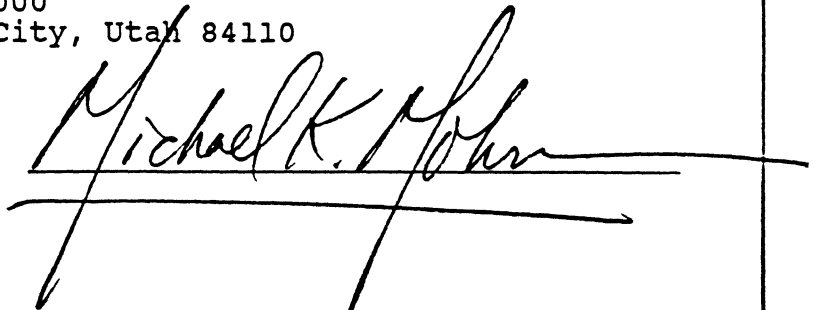
Van Wagoner & Stevens  
Mark O. Van Wagoner  
Lewis T. Stevens  
Phyllis J. Walton  
Attorneys for Plaintiffs  
Suite 550  
185 South State Street  
Salt Lake City, Utah 84111

Roger H. Bullock  
Strong & Hanni  
Attorney for Defendants  
Smith's Management Corpor  
Smith's Food King Properties  
Sixth Floor Boston Building  
Salt Lake City, Utah 84111

Paul H. Matthews  
Hanson, Dunn, Epperson & Smith  
650 Clark Leaming Office Center  
175 South West Temple  
Salt Lake City, Utah 84101

Paul S. Felt  
Ray, Quinney & Nebeker  
400 Deseret Building  
79 South Main Street  
P.O. Box 45385  
Salt Lake City, Utah 84134

Robert H. Henderson  
Snow, Christensen & Martineau  
P.O. Box 3000  
Salt Lake City, Utah 84110

  
\_\_\_\_\_

PICKHOV1/MMW

Tab D

EXHIBIT "D"

FILED

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

OCT 29 4 38 PM '86

ROBERT H. HENDERSON (A1461)  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Marveon, Inc.  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

H. BRONKHORST  
BY *Barbara Matheson*

---

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

TOSHIKO PICKHOVER, an indi-  
vidual and personal repre-  
sentative of the Estate of  
John W. Pickhover; CATHERINE  
PICKHOVER, an individual;  
and GLORIA PICKHOVER, an  
individual,

Plaintiffs,

vs.

SMITHS MANAGEMENT CORPORATION,  
a Utah corporation; SMITH'S  
FOOD KING PROPERTIES, a Utah  
corporation, DEE'S, INC., a  
Utah corporation; YOUNG  
ELECTRIC SIGN COMPANY, a Utah  
corporation; MARVEON, INC., a  
Utah corporation; and IMAGE  
NATIONAL, INC., an Idaho  
corporation,

Defendants.

---

DEFENDANT MARVEON, INC.'S  
REPLY MEMORANDUM IN SUPPORT  
OF MARVEON'S MOTION FOR  
SUMMARY JUDGMENT AGAINST  
DEFENDANT YOUNG ELECTRIC

Civil No. C85-4307

Honorable Scott Daniels



POINT I

THE PURCHASE AGREEMENT BETWEEN MARVEON AND YESCO MUST BE READ AS A WHOLE--YESCO'S ARGUMENTS WOULD EFFECTIVELY WRITE PARAGRAPH 2.a., THE PARAGRAPH WHEREBY YESCO AGREED TO PROVIDE INSURANCE ADEQUATE TO FULLY PROTECT MARVEON, RIGHT OUT OF THE PURCHASE AGREEMENT.

Yesco claims that the language in paragraph 20.c. of the Purchase Agreement that Marveon "has performed in all material respects all obligations . . . and is not in default in any material respect" somehow voids the promise in paragraph 2.a. to provide insurance coverage adequate to fully protect Marveon. Such a construction effectively writes paragraph 2.a. out of the Purchase Agreement. If, as Yesco argues, a personal injury or death arising out of a sign Marveon had installed meant that Marveon had not fully performed in all material respects, or that Marveon was somehow in default in a material respect, there could be no possible circumstances that could ever arise that would give any meaning to the provision of paragraph 2.a. whereby Yesco agreed to provide insurance coverage adequate to fully protect Marveon. If no injury or death, there is no need for insurance; but, according to Yesco, if there ever is an injury or death, Marveon has not performed and is in default, thus voiding paragraph 2.a.

Yesco claims that without the representation that Marveon had performed and was not in default, that Yesco would never

have agreed to provide the insurance coverage adequate to fully protect Marveon. Again, however, the argument fails logically. Had Marveon and Yesco known that no one would ever file a suit against Marveon, there would have been no reason for paragraph 2.a. The only way the two provisions of the Purchase Agreement can be interpreted harmoniously is that as far as Marveon knew at the time of the Purchase Agreement, Marveon had performed in all material respects and was not in default in any material respect. There is no evidence, and no claim has been made, that as of the time of the Purchase Agreement that Marveon knew of any problem with the sign out of which this lawsuit arises.

Even more fundamentally, paragraph 20 is simply not applicable to this case. Paragraph 20 clearly refers to "contracts" and "defaults." Paragraph 20.c. states: "Except as provided in Schedule L, [Marveon] is not a party to any contract adversely affecting assets being purchased or contracts being assumed." The language Yesco relies on is simply language clarifying and explaining this introductory sentence to paragraph 20.c. Paragraph 20 does not refer to personal injury lawsuits or deaths. Paragraph 2.a. is the paragraph that addresses personal injuries, deaths, and lawsuits arising therefrom, and is the paragraph that controls this case, not paragraph 20.

## POINT II

ALL OTHER UTAH INDEMNIFICATION CASES ARE DIFFERENT THAN THIS CASE. ALL OTHER CASES AROSE EITHER IN THE CONTEXT OF AN EMPLOYER LOSING THE EXCLUSIVE REMEDY PROVISION OF WORKMEN'S COMPENSATION IF THE INDEMNIFICATION AGREEMENT WERE UPHELD, OR CASES WHERE THE INDEMNITEE TOOK ADVANTAGE OF GREAT DISPARITY IN ECONOMIC POWER TO FORCE THE INDEMNITOR INTO THE INDEMNIFICATION AGREEMENT IN THE FIRST PLACE.

Yesco agreed to provide insurance coverage adequate to fully protect Marveon. Marveon was going out of business and Marveon was selling its assets to Yesco. This was an arm's length transaction where both parties knew Marveon would never again have any control over the signs. Paragraph 2.a. could not apply to anyone other than Marveon, and could not apply to any negligence other than Marveon's negligence. Marveon needed no provision to protect Marveon against Yesco's negligence. Marveon could not be sued for Yesco's negligence. Marveon was going out of business, Marveon wanted to be protected from future lawsuits, and thus the provisions of paragraph 2.a. whereby Yesco agreed to provide, at its expense, insurance coverage adequate to fully protect Marveon.

This case is different from all other Utah indemnification cases. Here there is no employer about to lose the exclusive remedy of workmen's compensation. Here there is no party with little or no bargaining power forced to enter into an adhesion

contract including an indemnification agreement to get the use of the product, or to be employed as a subcontractor, etc. In this case, there was an arm's length transaction wherein it made great business sense for Yesco, who was forever after to control and maintain the sign, to protect Marveon with insurance for future lawsuits.

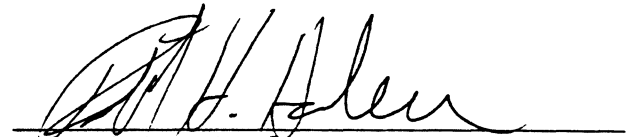
#### CONCLUSION

Assuming Yesco's best case, that Marveon's negligence was the sole proximate cause of the accident sued upon, Marveon is nevertheless entitled to judgment against Yesco, based on paragraph 2.a. of the Purchase Agreement, that, to the extent any judgment is entered against Marveon, Marveon is entitled to a judgment over against Yesco to the full amount of any such judgment up to the amount of \$1,000,000.

DATED this 24<sup>th</sup> day of October, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By

  
Robert H. Henderson  
Attorneys for Marveon

SCM2049H

MAILING CERTIFICATE

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

DONNA CAMPBELL, being duly sworn, states that she is employed  
in the offices of Snow, Christensen & Martineau, attorneys for

Marveon Sign, Inc. and that she served a copy of

Defendant Marveon, Inc.'s Reply Memorandum in Support of Marveon's  
Motion for Summary Judgment Against Defendant Young Electric  
upon the following parties:

Mark O. Van Wagoner  
VAN WAGONER & STEVENS  
Attorneys for Plaintiffs  
185 So. State St., Suite 550  
Salt Lake City, Utah 84111

Roger H. Bullock  
STRONG & HANNI  
6th Floor, Boston Bldg.  
Salt Lake City, Utah 84111  
Attorneys for Smiths

Paul H. Matthews  
HANSON & DUNN  
Attorneys for Image  
175 South West Temple  
Salt Lake City, Utah 84101

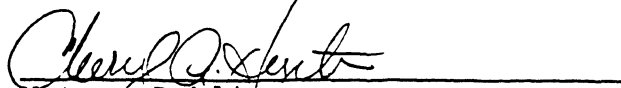
Gary D. Stott  
RICHARDS, BRANDT, MILLER  
& NELSON  
50 South Main, 7th Floor  
Salt Lake City, Utah 84144  
Attorneys for Young Electric

Paul S. Felt  
RAY, QUINNEY & NEBEKER  
P.O. Box 3850  
Salt Lake City, Utah 84110  
Attorneys for Dee's, Inc.

by placing a true copy thereof in an envelope and mailing the same,  
postage prepaid, on the 29th day of October, 1986.

  
Secretary

SUBSCRIBED AND SWORN TO BEFORE me this 29th day of October,  
1986.

  
Notary Public  
Residing in State of Utah

5/13/89  
My Commission Expires

000354

Tab E

EXHIBIT "E"

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

NOV 10 1986

H. Dixon Hindley, Clerk 3rd Dist Court  
By [Signature]  
Deputy Clerk

ROBERT H. HENDERSON  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Marveon Sign Company  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

*Bl 211 NO. 782  
11-13-86 - 8:44 AM*

---

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

---

TOSHIKO PICKHOVER, et al.,

Plaintiffs,

ORDER AND JUDGMENT

vs.

SMITH'S MANAGEMENT  
CORPORATION, et al.,

Defendants.

Civil No. C85-4307

Judge Scott Daniels

---

Defendant, Marveon, Inc.'s (Marveon) Motion for Summary Judgment Against Defendant Young Electric Sign Company (YESCO) came on regularly for Hearing before The Honorable Scott Daniels at the Law and Motion calendar at 10:00 a.m. on October 31, 1986. Each party was represented by counsel. The Court heard the arguments of Robert H. Henderson of the law firm Snow, Christensen & Martineau on behalf of Marveon and Michael K. Mohrman of the law firm Richards, Brandt, Miller & Nelson on behalf of YESCO. The Court fully reviewed the Memoranda on file and the Court was fully advised.

The Court concludes that in the event any judgment is returned in favor of plaintiffs and against Marveon, that Marveon is entitled to be indemnified by YESCO for the full amount of any such judgment up to \$1,000,000 and that YESCO be required to pay Marveon's costs and attorneys' fees from and after the date of the tender of the defense of Marveon to YESCO.

NOW, THEREFORE, IT IS ORDERED:


That Marveon's Motion for Summary Judgment Against YESCO be, and hereby is granted.

Based thereon, NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

Judgment be, and hereby is entered in favor of Marveon and against YESCO that in the event any judgment is returned in favor of plaintiffs and against Marveon that Marveon is entitled to be indemnified by YESCO for the full amount of any such judgment up to \$1,000,000, and that YESCO pay Marveon's costs and attorneys' fees from and after the date of the tender of defense of Marveon to YESCO.

DATED this 10 day of November, 1986.

BY THE COURT:



SCOTT DANIELS  
District Court Judge

ATTEST  
H. DIXON HINDLEY  
Clerk

000466



AFFIDAVIT OF SERVICE

STATE OF UTAH                    )  
                                      :ss.  
COUNTY OF SALT LAKE    )

Donna Campbell, being sworn, says that she is employed in the law offices of Snow, Christensen & Martineau, attorneys for Marveon Sign, Inc., that she served the attached Order and Judgment upon the following parties by hand delivery to on the 31st day of October, 1986:

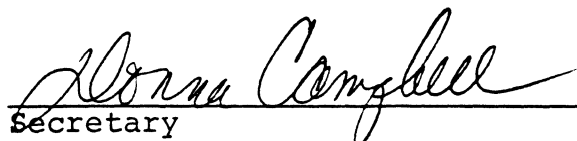
Mark O. Van Wagoner  
VAN WAGONER & STEVENS  
Attorneys for Plaintiffs  
185 South State St., Ste. 550  
Salt Lake City, Utah 84111

Roger H. Bullock  
STRONG & HANNI  
6th Floor, Boston Bldg.  
Salt Lake City, Utah 84111  
Attorneys for Smiths

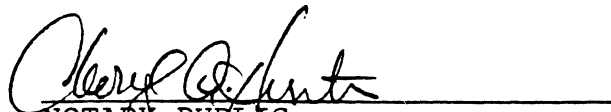
Paul H. Matthews  
HANSON & DUNN  
Attorneys for Image  
175 South West Temple  
Salt Lake City, Utah 84101

Gary D. Stott  
RICHARDS, BRANDT, MILLER  
& NELSON  
50 South Main, 7th Floor  
Salt Lake City, Utah 84144  
Attorneys for Young Electric

Paul S. Felt  
RAY, QUINNEY & NEBEKER  
P.O. Box 3850  
Salt Lake City, Utah 84110  
Attorneys for Dee's, Inc.

  
Secretary

SUBSCRIBED AND SWORN to before me this 31<sup>st</sup> day of October, 1986.

  
NOTARY PUBLIC  
Residing in State of Utah

My Commission Expires:

May 13, 1989

Tab F

EXHIBIT "F"

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

JAN 2 1987

GARY D. STOTT [A3130]  
MICHAEL K. MOHRMAN [A4094]  
RICHARDS, BRANDT, MILLER  
& NELSON

H. Dixon Hinds, Clerk  
By Handwritten Signature

Attorneys for Defendant Young Electric Sign Company  
CSB Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TOSHIKO PICKHOVER, an individ-  
ual and personal representa-  
tive of the Estate of John W.  
Pickhover; CATHERINE PICKHOVER,  
an individual; and GLORIA  
PICKHOVER, an individual,

Plaintiffs,

vs.

SMITH'S MANAGEMENT CORPORATION,  
a Utah corporation; SMITH'S  
FOOD KING PROPERTIES, A Utah  
corporation; DEE'S, INC.,  
a Utah corporation; YOUNG  
ELECTRIC SIGN COMPANY, a Utah  
corporation; MARVEON, INC.,  
a Utah corporation; and IMAGE  
NATIONAL, INC., an Idaho  
corporation,

Defendants.

CERTIFICATION OF SUMMARY  
JUDGMENT AS FINAL ORDER

Civil No. C85-4307

On the 20th day of November, 1986, the defendant,  
Young Electric Sign Company, by and through its counsel of  
record, Michael K. Mohrman, appeared before the District Court of  
the Third Judicial District in and for Salt Lake County, State of

CSB TOWER, SUITE 700  
50 SOUTH MAIN STREET  
P O BOX 2465  
SALT LAKE CITY, UTAH 84110  
TELEPHONE (801) 531-1777

Utah and requested the Court to certify as a final order, the Summary Judgment previously granted in favor of Marveon as against Young Electric Sign Company (YESCO). The Court finds that the Summary Judgment in favor of Marveon and against Young Electric Sign Company is a final order on an entire claim. The Court specifically finds that this claim could be appealed while the remainder of the case continues to be litigated and finds that there is no just reason for delay with regard to this matter.

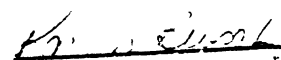
IT IS HEREBY ORDERED that the Summary Judgment granted in favor of Marveon as against Young Electric Sign Company is a final order and is certified as such for immediate appeal pursuant to Rule 54(b) of Utah Rules of Civil Procedure.

DATED this 2 day of <sup>Dec</sup>~~December~~, 1986.

BY THE COURT

  
HONORABLE SCOTT DANIELS  
District Court Judge

ATTEST  
H. DIXON HINDLEY  
Clerk

By   
Deputy Clerk

CSB TOWER, SUITE 700  
50 SOUTH MAIN STREET  
P O BOX 2465  
SALT LAKE CITY, UTAH 84110  
TELEPHONE: (801) 531-1777

A PROFESSIONAL LAW CORPORATION  
CSB TOWER, SUITE 700  
50 SOUTH MAIN STREET  
P O BOX 2465  
SALT LAKE CITY, UTAH 84110  
TELEPHONE (801) 531-1777

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing document by first-class mail, postage prepaid, this 12<sup>th</sup> day of December, 1986, to:

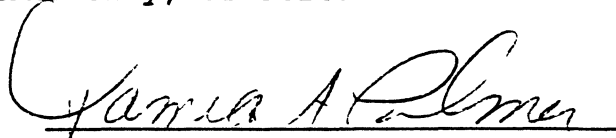
Van Wagoner & Stevens  
Mark O. Van Wagoner  
Lewis T. Stevens  
Phyllis J. Walton  
Attorneys for Plaintiffs  
Suite 550  
185 South State Street  
Salt Lake City, Utah 84111

Roger H. Bullock  
Strong & Hanni  
Attorney for Defendants  
Smith's Management Corpor  
Smith's Food King Properties  
Sixth Floor Boston Building  
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Paul H. Matthews  
Hanson, Dunn, Epperson & Smith  
650 Clark Leaming Office Center  
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Salt Lake City, Utah 84101

Paul S. Felt  
Ray, Quinney & Nebeker  
400 Deseret Building  
79 South Main Street  
P.O. Box 45385  
Salt Lake City, Utah 84134

Robert H. Henderson  
Snow, Christensen & Martineau  
P.O. Box 45000  
Salt Lake City, UT 84145

  
Pamela A. Palmer

4a1136

CERTIFICATE OF SERVICE

I hereby certify that four copies of the Respondent's Brief have been served by mail on each party or his counsel by mailing, first class, postage prepaid, on this \_\_\_\_\_ day of \_\_\_\_\_, 1987, to the following counsel of record:

Mark O. Van Wagoner  
VAN WAGONER & STEVENS  
Attorneys for Plaintiffs  
215 South State St., Suite 500  
Salt Lake City, Utah 84111

Roger H. Bullock  
STRONG & HANNI  
6th Floor, Boston Bldg.  
Salt Lake City, Utah 84111  
Attorneys for Smiths

Paul H. Matthews  
HANSON, DUNN, EPPERSON & SMITH  
175 South West Temple  
Salt Lake City, Utah 84101

Michael S. Mohrman  
RICHARDS, BRANDT, MILLER  
& NELSON  
50 South Main, 7th Floor  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Attorneys for Young Electric

Paul S. Felt  
RAY, QUINNEY & NEBEKER  
P.O. Box 3850  
Salt Lake City, Utah 84110  
Attorneys for Dee's, Inc.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1987.

SNOW, CHRISTENSEN & MARTINEAU

By \_\_\_\_\_  
Robert H. Henderson  
Attorneys for Marveon

SCMRHH138

Tab G

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

TOSHIKO PICKHOVER, an  
individual and personal  
representative of the Estate  
of John W. Pickhover; CATHERINE  
PICKHOVER, an individual and  
GLORIA PICKHOVER, an individual,\*

Plaintiffs,\*

vs.\*

SMITH'S MANAGEMENT CORPORATION,\*  
A Utah corporation; SMITH'S  
FOOD KING PROPERTIES, a Utah  
corporation; YOUNG ELECTRIC  
SIGN COMPANY (Appellant);  
MARVEON, INC. (Respondent);  
and IMAGE NATIONAL, INC., an  
Idaho corporation,\*

Defendants.\*

Civil No. 880193-CA

Case No. \_\_\_\_\_

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EX PARTE REQUEST AND ORDER FOR EXTENSION OF  
TIME TO FILE PETITION FOR CERTIORARI

---

An Appeal from the Amended Opinion of the  
Utah Court of Appeals dated April 11, 1989.

---

ROBERT H. HENDERSON  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000  
Attorneys for Respondent

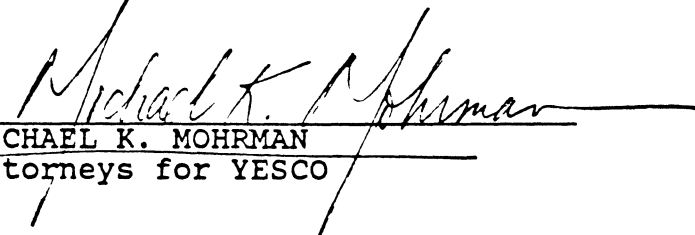
MICHAEL K. MOHRMAN  
RICHARDS, BRANDT, MILLER &  
NELSON  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777  
Attorneys for Appellant/  
Petitioner



COMES NOW the defendant and petitioner Young Electric Sign Company pursuant to Rule 45(e) Rules of the Utah Supreme Court and requests this Court for an order extending the time to file its Petition for Certiorari to and including June 12, 1989.

RESPECTFULLY SUBMITTED this 11 day of May, 1989.

RICHARDS, BRANDT, MILLER  
& NELSON

  
MICHAEL K. MOHRMAN  
Attorneys for YESCO

ORDER

Pursuant to Rule 45(e) Rules of the Utah Supreme Court and pursuant to the ex parte request of petitioner Young Electric Sign Company,

IT IS HEREBY ORDERED that Young Electric Sign Company may have to and including June 12, 1989 to file its Petition for Certiorari.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1989.

BY THE COURT:

\_\_\_\_\_  
JUSTICE, UTAH SUPREME COURT

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 11<sup>th</sup> day of May, 1989, to the following counsel of record:

Robert H. Henderson  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

Pat Moeller

PICK4/MMW  
pm051189  
6049-136

Tab H

GARY D. STOTT [A3130]  
MICHAEL K. MOHRMAN [A4094]  
RICHARDS, BRANDT, MILLER  
& NELSON  
Attorneys for Defendant Young Electric Sign Company  
CSB Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

TOSHIKO PICKHOVER, an individ-	:	
ual and personal representa-	:	
tive of the Estate of John W.	:	DOCKETING STATEMENT
Pickhover; CATHERINE PICKHOVER,	:	
an individual; and GLORIA	:	
PICKHOVER, an individual,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
SMITH'S MANAGEMENT CORPORATION,	:	
a Utah corporation; SMITH'S	:	
FOOD KING PROPERTIES, A Utah	:	
corporation; DEE'S, INC.,	:	
a Utah corporation; YOUNG	:	
ELECTRIC SIGN COMPANY (Appellant);	:	Case No. <u>872060</u>
MARVEON, INC. (Respondent); and	:	
IMAGE NATIONAL, INC., an Idaho	:	
corporation,	:	
	:	
Defendants.	:	

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JURISDICTION

Jurisdiction to hear the above entitled appeal is conferred in the Utah Supreme Court, pursuant to Rule 3(a) and Rule 54(b) Utah Rules of Appellate Procedure. Specifically, the trial court directed that the Order was a final judgment as

to one of the claims and as to only two of the parties, but there was no just reason for delay as to the determination of the issues presented.

#### NATURE OF PROCEEDING

This appeal is to reverse a decision of the Third Judicial District Court, Judge Scott Daniels presiding, granting the Motion for Partial Summary Judgment of Marveon, Inc. against the defendant and appellant, Young Electric Sign Company.

#### DATE OF JUDGMENT

The court originally rendered its decision on October 31, 1986; however, the court did not certify the Summary Judgment as a final order pursuant to Rule 54(b) Utah Rules of Civil Procedure until January 2, 1987. Notice of Appeal was filed on February 2, 1987 and an Order for Extension of Time to File Docketing Statement was granted on the 23rd day of February, 1987. The Order gave the appellant until March 5, 1987 to file the Docketing Statement.

#### STATEMENT OF FACTS

This appeal arises out of a wrongful death action filed by the survivors of John W. Pickhover. On July 5, 1985 a sign fell off of a side of a Smith's Food King located at approximately 94th South in Sandy, Utah. The sign struck and killed the plaintiffs' decedent, John Pickhover. It is undisputed that the sign had been installed by the defendant Marveon Sign Company (hereinafter Marveon) some time in 1978. Subsequent to that time in August of 1981, another defendant, Young Electric Sign Company (hereinafter YESCO)

negotiated for and bought the assets of Marveon. Among the assets purchased by YESCO were the maintenance contracts, including a maintenance contract for the Smith's Food King located in Sandy. A Purchase Agreement between Marveon and YESCO was subsequently drafted which provided in part that YESCO would "provide, at its expense, insurance coverage adequate to fully protect ]Marveon[ against . . . personal injury or death claims arising out of the ownership, maintenance, use, service, transportation or installation of displays in a minimum amount of One Million Dollars (\$1,000,000)." After the institution of the suit by the plaintiffs against the defendants in the above-captioned matter, the defendant Marveon filed a Motion for Partial Summary Judgment against the defendant YESCO. Essentially, Marveon's Motion for Summary Judgment requested that to the extent that the plaintiffs obtained any judgment against Marveon, YESCO should be required to indemnify Marveon for the full extent of any judgment up to One Million Dollars (\$1,000,000).

Subsequently, the defendant YESCO filed a Memorandum in Opposition to the defendant Marveon's Motion for Summary Judgment arguing that the language relied upon by Marveon in the Purchase Agreement was not sufficient to support Summary Judgment. The District Court, the Honorable Scott Daniels presiding, granted the Motion for Summary Judgment in favor of Marveon and subsequently certified the Summary Judgment as a Final Order. This appeal ensued.

### ISSUE FOR REVIEW

The defendant Young Electric Sign Company brings the following issue for review in this appeal:

1. Whether the language of the Purchase Agreement cited by the defendant Marveon in its Motion for Summary Judgment is sufficient to require the defendant YESCO to indemnify and/or insure Marveon for its own negligence.

### CASES

The defendant Young Electric Sign Company will rely on the following cases, among others, in support of its appeal: Kennecott Copper Corp. v. General Motors Corp., 730 F.2d 1380 (10th Cir. 1984); Union Pacific Railroad v. Intermountain Farmers Association, 568 P.2d 724 (1977); Union Pacific Co. v. El Paso Natural Gas Co., 17 Utah.2d 255, 408 P.2d 910 (1965), Howe Rents Corp. v. Worthen, 420 P.2d 848 (1966) and Freund v. Utah Power and Light, 625 F. Supp. 272 (D. Utah 1985) and Shell Oil Co. v. Brinkerhoff Signal Drilling Co., 658 P.2d 1187 (Utah 1983).

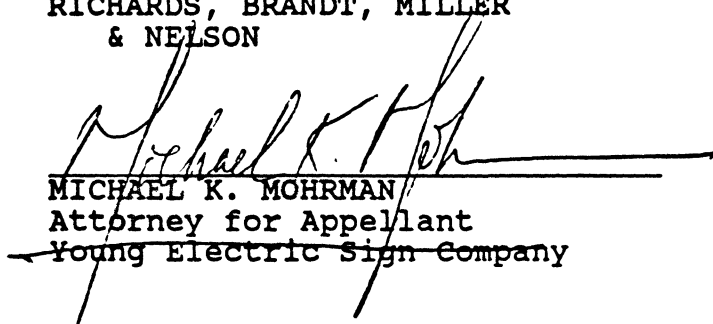
### PRIOR APPEALS

There have been no related or prior appeals in this

particular case.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of March, 1987.

RICHARDS, BRANDT, MILLER  
& NELSON

  
MICHAEL K. MOHRMAN  
Attorney for Appellant  
~~Young Electric Sign Company~~

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Docketing Statement was mailed, this 5<sup>th</sup> day of March, 1987, to:

Van Wagoner & Stevens  
Mark O. Van Wagoner  
Lewis T. Stevens  
Phyllis J. Walton  
Attorneys for Plaintiffs  
Suite 550  
185 South State Street  
Salt Lake City, Utah 84111

Roger H. Bullock  
Strong & Hanni  
Attorney for Defendants  
Smith's Management Corpor  
Smith's Food King Properties  
Sixth Floor Boston Building  
Salt Lake City, Utah 84111

Paul H. Matthews  
Hanson, Dunn, Epperson & Smith  
650 Clark Leaming Office Center  
175 South West Temple  
Salt Lake City, Utah 84101

Paul S. Felt  
Ray, Quinney & Nebeker  
400 Deseret Building  
79 South Main Street  
P.O. Box 45385  
Salt Lake City, Utah 84134



Robert H. Henderson  
Snow, Christensen & Martineau  
P.O. Box 45000  
Salt Lake City, UT 84145

A handwritten signature in cursive script, appearing to read "Michael K. [unclear]", is written over a single horizontal line. The signature is fluid and somewhat stylized, with the last name being partially obscured by the line and the signature's own strokes.

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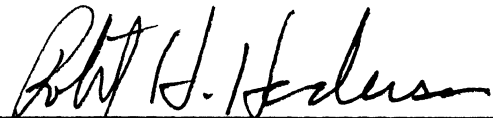
CERTIFICATE OF SERVICE

I hereby certify that four copies of Marveon's Brief in Opposition to Petition for Writ of Certiorari have been served by mail on each party or his counsel by mailing, first class, postage prepaid, on this 26th day of June, 1989, to the following counsel of record:

Michael S. Mohrman  
RICHARD, BRANDT, MILLER  
& NELSON  
Attorneys for Young Electric  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110

DATED this 26<sup>th</sup> day of June, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By   
Robert H. Henderson  
Attorneys for Marveon